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ABSTRACT

Information to aid the school-law specialist in handling transportation issues is provided in this handbook. Following an introduction, section 2 discusses the school's liability for transportation decisions, including school bus safety requirements, selection of transportation, the care owed to students, and school defenses in transportation litigation. The third section examines issues in the school's duty to provide transportation to students, such as governance decisions, general financial considerations, funding, transportation of nonpublic school and special needs students, and transportation for desegregation purposes. Recommendations are made to comply with state/federal requirements to receive reimbursement aid; to develop coherent, consistently enforced policies pertaining to the types of vehicles used for school activities; and to undertake preventative measures at the school/district level. An extensive table of litigation cases is included. (LMI)

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Pupil Transportation and the Law

Ralph D. Mawdsley

NOLPE

No. 46 in the NOLPE Monograph/Book Series

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Forward

Pupil Transportation and the Law is a completely up-dated and significantly expanded version of the 1984 monograph by Dr. Ralph Mawdsley entitled: *The Legal Aspects of Pupil Transportation*. NOLPE's publishing this revision is consistent with its practice through the years of commissioning subsequent editions of the successful titles in the monograph series that have served well particular segments of the membership and of the education and legal professions, generally.

The purpose of the new publication remains the same, i.e., "to aid school law specialist in their handling of transportation issues." The author has retained the organization of his previous monograph, presenting the information under the two major headings: "Liability for Transportation Decisions" and "Duty to Transport Students." The body of case law that has developed during the past eight years, including that dealing with transportation of special needs students and transportation for desegregation purposes, make this up-dated volume a particularly valuable resource for superintendents and the other school administrators responsible for transporting students, whether by district-owned vehicles, leasing arrangement with commercial transporters, or by privately-owned vehicles. The monograph is equally useful for the practicing attorney who represents school districts and school officials.

Floyd G. Delon
Executive Director
NOLPE
Summer 1992

About the Author

Ralph D. Mawdsley is Professor of Educational Administration at Cleveland State University. Prior to accepting his current position, he spent twelve years as Administrative Counsel and Vice President of Human Resources at Liberty University. His education experience includes twelve years as a teacher and superintendent in a private school in Minneapolis, Minnesota, where he also served as an Adjunct Professor at the University of Minnesota. In addition to his Ph.D. in educational administration from the University of Minnesota, Dr. Mawdsley earned his J.D. degree from the University of Illinois.

He has spoken and written widely on topics pertaining to all phases and all levels of education. He has authored several NOLPE monographs, including *Pupil Transportation*, *Legal Problems of Religious and Private Schools*, *Legal Aspects of Plagiarism*, and *Free Expression and Censorship: Public Policy and the Law*. In addition Dr. Mawdsley authors the chapter on Employees for *The Yearbook of Education Law* and has contributed chapters to two different *NOLPE Case Citation Series*. He has served NOLPE on the program, publication, and membership committees, as well as on the Board of Directors. He serves on *West's Education Law Reporter* Editorial Advisory Committee and is a frequent contributor to the *Education Law Reporter*.

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I. INTRODUCTION

The responsibility of school boards and superintendents to provide transportation for students has become one of the most daunting tasks in the increasingly complex world of school administration. Like some three dimensional jigsaw puzzle, school officials must sort through seemingly endless and complex statutes and regulations to arrange transportation for all categories of students designated by state statute, as well as categories mandated by federal statutes or court orders. For the typical administrator, this will mean students residing more than the maximum walking distance, nonpublic students traveling to schools within or without the district, and handicapped students. In some larger school districts still under court-ordered busing, arrangements will also have to be made to bus students in conformance with the court order. On top of the scheduling problems suggested already, school officials may be called upon to provide transportation to groups for which no state reimbursement is available and therefore a user fee must be charged.

In addition, school officials must recruit and train qualified bus drivers who satisfy the state standards and must continually monitor the drivers to assure that they operate buses in conformity with state requirements. School boards that operate their own buses must regularly inspect them to determine that they comply with state standards. If school boards decide to contract out bus transportation, they must comply with state bidding requirements and monitor the contractors since the school boards do not abrogate their statutory responsibilities simply by contracting out services.

All of the above operational decisions are played out against a backdrop of possible tort liability where students or members of the public are injured as a result of the operation of a school bus. When injuries or property damage occur, school officials must be alert to notices of tort claims that are frequently prelude to a lawsuit. Defenses, such as governmental immunity and contributory negligence, which may be available do not offset the time and energy that must be invested to adequately defend a charge of negligence.

In short, the tasks of school officials in managing school transportation are never easy. Despite the considerable variances among the states regarding requirements for pupil transportation, the purpose of this publication is to identify and discuss the most important transportation problems facing school officials.

II. LIABILITY FOR TRANSPORTATION DECISIONS

A. School Bus Safety Requirements

The responsibility of school districts and school board members to provide a safe and comprehensive transportation system is subject to the general principles of negligence, except where those principles have been altered by statute. Although considerable litigation is generated each year regarding school transportation, school buses on the whole "have an extremely good safety record, considering the pupil miles traveled and the type of rider involved."¹ The safety record of buses is no doubt due in significant part to comprehensive bus safety legislation in many states imposing such requirements as single body construction,² regular school bus inspections,³ maximum passenger capacities,⁴ prohibition of use of recapped tires,⁵ presence of mirrors,⁶ use of stop signals, arms and lights,⁷ location of fire extinguishers,⁸ required chauffeur's licenses for drivers,⁹ and required seat belts for drivers.¹⁰ However, mandatory seat belts for passengers have been excluded in some cases by statute or case

¹ E. Connors, *Educational Tort Liability and Malpractice* (1981) at 67.

² See Pa. Cons. Stat. Ann. tit. 75 § 4552(c) (Purdon 1977) ("a single, closed metal body with adequate ventilation.")

³ E.g., see Minn. Stat. Ann. § 169.451 (West Supp. 1992) (operation of bus cannot be more than within 13 months of inspection); Fla. Stat. Ann. § 234.02 (West Supp. 1992) (examination of each bus made by capable mechanic at least once each month bus is in operation); Iowa Code Ann. § 321.374 (West 1985) (buses must be inspected before first being put into use and then at least once a year after that); S.C. Code § 59-67-270 (1977) (school buses "subject to inspection at any time or place by officers of the State Highway Patrol.")

⁴ E.g., see Minn. Stat. Ann. § 169.447(1) (West Supp. 1992) ("not more than the number of pupils or passengers that can be fully seated...[and in any case] not more than the manufacturers rated seated capacity."); Pa. Cons. Stat. Ann. tit. 75 § 4552 (Purdon 1977) ("... no passenger shall be carried for which adequate seating is not available and used"). But see S.C. Code § 59-67-100 (1977) ("...seating space shall be provided for each pupil transported. *Provided, however,* that a limited number of standees may be permitted until the bus routes can be adjusted to accommodate the overload but not to exceed twenty school days.") See also Cal. Educ. Code § 39834 (West 1978) (overloading bus in excess "of the limits of its seating capacity" a misdemeanor.)

⁵ Minn. Stat. Ann. § 169.447(3) (West Supp. 1992 (applies to front wheels only).

⁶ Iowa Code Ann. § 321.437 (West Supp. 1991) (must provide driver view at least 200 feet to rear of vehicle).

⁷ E.g., see Minn. Stat. Ann. § 169.44(10) (West 1986); Iowa Code Ann. § 321.372 (West 1985).

⁸ Cal. Educ. Code § 39838 (West 1978) (at least one fire extinguisher per bus with aggregate rating of at least 8-B.C units). Pa. Cons. Stat. Ann. tit. 75 § 4552(f) (Purdon 1977).

⁹ E.g., see Fla. Code Ann. § 234.091 (West 1989). See also, Cal. Educ. Code § 39833 (West 1978) (operation of school bus without appropriate license a misdemeanor).

¹⁰ E.g., see Iowa Code Ann. § 321.445 (West 1985).

law.¹¹ In addition, the use of a particular color may be reserved by statute for buses being used as school buses.¹² Statutes frequently extend beyond the condition and operation of the school buses themselves and impose requirements on drivers of other vehicles on a highway.¹³ States generally define what constitutes a school bus and may do so quite expansively to include "any motor vehicle while being used for the transportation of any school pupil at or below the 12th grade level to and from a public or private school or to and from public or private school activities."¹⁴

Except where state boards of education receive their authority to establish regulations directly from the state constitution,¹⁵ state legislatures usually delegate to state boards of education the authority to adopt regulations pertaining to the transportation of children and, when adopted, such regulations have the force and effect of law.¹⁶ However, the responsibility for implementing safe means of transportation rests with

¹¹ *E.g.*, see Iowa Code Ann. § 321.1445(2)(d) (1987); Ind. Code Ann. § 20-9.1-2-10 (West 1984). See also *Dentson v. Eddins & Lee Bus Sales, Inc.*, 491 So. 2d 942 (Ala. 1986).

¹² See Minn. Stat. Ann. § 169.448(1) (West Supp. 1992) (no bus not being used as a school bus can operate on highways unless "painted a color significantly different than national school bus glossy yellow or Minnesota school bus golden orange"); Fla. Stat. Ann. § 234.041 (West 1989) (person guilty of misdemeanor if using "bus of an orange or yellow color known as 'school bus chrome'" for other than transporting persons to educational or recreational facilities).

¹³ *E.g.*, see Minn. Stat. Ann. § 169.444 (West Supp. 1992) (driver who fails to stop for stopped bus receiving or discharging children guilty of misdemeanor or gross misdemeanor); Iowa Code Ann. § 321.372A (West Supp. 1991) (mandating investigation by state police if bus driver reports vehicle that failed to stop). See *State v. Wolfram*, 577 N.E.2d 442 (Ohio Ct. App. 1989) (driver who was behind school bus and who drove through parking lot adjacent to stopped bus and exited in front of bus did "overtake" bus in violation of statute.) See also Pa. Cons. Stat. Ann. tit. 75 § 4553 (Purdon Supp. 1991) (mass transit bus equipped and identified as school bus for purposes of transporting school children comes within statutory provision requiring motorists to stop).

¹⁴ Cal. Educ. Code § 39830(a) (West 1978) However, the statute has numerous exceptions, such as "a motor vehicle of any type carrying only members of the household of the owner thereof." *Id.* at § 39830(c). See also Fla. Stat. Ann. § 234.051 (West Supp. 1992) (school bus is any motor vehicle used regularly to transport children to prekindergarten through grade 12, with exceptions, such as "passenger cars, multipurpose passenger vehicles and trucks....").

¹⁵ See *West Virginia Bd. of Educ. v. Hechler*, 376 S.E.2d 839 (W. Va. 1988) (state board of education rule making authority pursuant to "general supervision" granted to board under state constitution prevented state legislature from requiring that rules be submitted to a legislative oversight commission prior to submission to entire legislature for acceptance or rejection.)

¹⁶ *E.g.*, see N.C. Gen. Stat. § 115C-240 (1991) (allocation of money appropriated by legislation); *Styers v. Phillips*, 178 S.E.2d 583 (N.C. 1971); Minn. Stat. Ann. § 123.80 (West Supp. 1992) (implementation applies to all school districts receiving state aid); *Mikes v. Baumgartner*, 152 N.W.2d 732 (Minn. 1967); *Anderson v. Ohm*, 258 N.W.2d 114 (Minn. 1977). See also Fla. Stat. Ann. § 234.101 (West 1989) (requirements for school bus drivers); Cal. Educ. Code § 39831 (West Supp. 1992); *Yeoman v. Department of Motor Vehicles*, 78 Cal. Rptr. 251 (Ct. App. 1969); S.C. Code Ann. § 59-67-490 (Law. Co-op. 1977) (State Board of Education must approve all school district bus routes).

the school district.¹⁷ State statutes may even give local boards authority to determine whether taxpayer supported transportation needs to be provided.¹⁸ Since local school officials, from the bus driver to members of the school board,¹⁹ will likely be sued in the event of an injured student, it is especially necessary for local officials and board members to be aware of potential legal problem areas.

The variances among the states regarding safety features has prompted the federal government to adopt guidelines and standards regarding the manufacture, equipping, and operation of school buses. Among the more interesting of the guidelines are: use of a rod in front of the bus to keep children exiting and crossing in the front of the bus within the direct view of the driver; use of signal arms and lights by local transit buses when transporting school children; semiannual bus inspections; twice-a-year emergency evacuation drills for students riding buses; and seating accommodation for a person at least as large as a 5th percentile adult female.²⁰ More daunting and demanding are the highly detailed and technical performance requirements for school bus design and manufacture to protect bus occupants in the event of a crash.²¹

B. Selection of Transportation

1. Failure to Provide Transportation

Absent some legislative or judicial mandate²² to provide pupil transportation, local school districts technically can decide not to furnish

¹⁷ See Fla. Stat. Ann. § 234.02 (West Supp. 1992); Ga. Code § 20.2-1071 (1987).

¹⁸ E.g., see Cal. Educ. Code § 39800 (West 1978). But see, Ohio Rev. Code § 3327.01 (Page 1990) (local school board has authority to deny transportation beyond maximum walking distance only where confirmed in advance by state board of education).

¹⁹ The individual liability of board members for the alleged tortious acts of school officials or themselves is often limited to those situations where board members are found to have acted in bad faith. See *Walt Bennett Ford v. Pulasky County Special Sch. Dist.*, 624 S.W.2d 426 (Ark. 1981). H. Hudgins & R. Vacca, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS (1985) at 83. ("In order to hold a [school board] member liable, it must be shown that he was motivated by malice, corrupt motive, or attempt to injure.") However, school board members may be criminally liable for knowingly permitting to be used "any school bus transporting public school pupils in violation of any school transportation law." Iowa Code Ann. § 285.14 (West 1988). See also, Ga. Code § 20.2-2-1074 (1987) (board members, superintendents, or any other person can be guilty of a misdemeanor for transporting student for whom physician has determined transportation would be detrimental to health.)

²⁰ 23 C.F.R. § 1204.4 (Highway Safety Program Guideline No. 17) (1991).

²¹ 49 C.F.R. § 571.220 (Standard No. 220; School bus rollover protection), § 571.221 (Standard No. 221; School body joint strength), and § 571.222 (Standard No. 222; School bus passenger seating and crash protection) (1990).

²² See discussion of legislative and judicial mandates, *infra* notes 26-37 and accompanying text.

transportation.²³ Generally, if the provision of pupil transportation is truly optional, lawsuits to force districts to provide bus service will fail either because the state has declared no clear legislative intent to provide transportation²⁴ or because the state's constitution, legislature, or courts have declared no fundamental constitutional right to an education.²⁵

The absence of legislative or constitutional mandates to furnish transportation does not insulate a school district from lawsuits where students are injured in situations where arguably the presence of transportation would have prevented the injury. In *Plesnicor v. Kovach*²⁶ a junior high student was injured as she crossed a street on her way home from school after her after-school participation in an extracurricular activity. The state in this case, Illinois, did not require that school districts provide transportation from extracurricular activities.²⁷ Alleging that defendant school board knew of the high volume of traffic and absence of a traffic light by which plaintiff could have crossed the busy street safely the complaint charged that the school board:

(a) Failed to provide a system of bus transportation to transport students remaining after regular class hours to participate in extracurricular activities to their homes.

²³ A decision not to provide transportation is really academic since every state will furnish some form of transportation to at least some component of its constituency, if for no other reason, as part of its commitment to compulsory attendance. For example,

School boards...shall provide transportation for each pupil who should attend a public school when, and only when, transportation is necessary to provide adequate educational facilities and opportunities which otherwise would not be available.... Fla. Stat. Ann. § 234.01 (West Supp. 1991).

However, except in certain categories, if bus transportation is optional then failure to provide or continue such transportation does not violate constitutional provisions. See Mich. Comp. Laws § 380.246(d) (1988) and *Sutton v. Cadillac Area Pub. Schs.*, 323 N.W.2d 582 (Mich. Ct. App. 1982) (failure to provide transportation not equal protection violation). See also *Lintz v. Board of Educ., Alpena Pub. Schs.*, 325 N.W.2d 803 (Mich. Ct. App. 1982) (discontinuation of bus transportation due to shortage of funding not violation of constitutional provision requiring the maintenance of a state system of free public schools).

²⁴ See *Lintz*, 325 N.W.2d at 805-806. ("[T]he [statutory] provision makes it clear that the legislature has the power *but not the duty*, to provide for the free transportation of students to and from all schools.") (emphasis in original).

²⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education not a fundamental constitutional right under federal constitution). See also *Sutton*, *supra* note 23, (education not fundamental constitutional right under state constitution). But compare *Collins v. Ritchie*, 351 S.E.2d 416 (W. Va. 1986) (education a fundamental constitutional right in West Virginia and failure to furnish transportation a violation of state constitutional provision providing for free and efficient schools); *Shaffer v. Board of Sch. Directors*, 687 F.2d 718 (3d Cir. 1982) (even though no state constitutional right to education, failure to provide two-way kindergarten transportation violated state statute requiring safe and effective transportation).

²⁶ 430 N.E.2d 648 (Ill. App. Ct. 1981).

²⁷ Ill. Ann. Stat. ch. 122 § 29-3.1 (Smith-Hurd Supp. 1989).

(b) Provided a bus system for transportation of students which was defective, in that it did not provide transportation for students remaining after normal hours to participate in extra-curricular activities to their homes.²⁸

In finding that the school district had no "affirmative duty...to supply this missing bus service"²⁹ the court observed that the state statute made optional the provision of transportation from any school-sponsored activities and that educators should have no greater responsibility for such transportation than would parents under the state's *in loco parentis* statute.³⁰ In a case from another jurisdiction, but with a similar result, a California court held that because the statutory responsibility to transport was permissive only, damages were not recoverable for injury to a child walking home from school after the school district had reduced its two-way transportation to one-way.³¹

Although the absence of mandatory transportation requirements normally will not form the basis for a complaint grounded in negligence, individual variant fact situations may arise that require the imposition of liability. In *Foster v. Houston General Insurance Company*,³² two teachers of mentally-retarded students and a school board were held liable for the death of one of the students who had run out into a street at a busy intersection. The teachers had elected to walk 10 or 11 mentally-retarded students three blocks from their school to the gymnasium, a journey which required the crossing of a busy street. Although the teachers had not requested transportation to the gymnasium, evidence was offered that the district had a policy not to provide transportation for short trips. Whether or not such a policy existed, the school board's liability under the doctrine of respondent superior was premised on the teachers' "failure to provide alternate transportation."³³ The imposition of liability in *Foster*, based on a unique set of facts, due to the nature of the students and the danger represented by the busy street, indicates that transportation decisions need to be evaluated according to criteria other than requirements of statutes or constitutions. To the extent that transportation

²⁸ *Supra*, note 26 at 650.

²⁹ *Id.* at 651. For a discussion of the broad range of duties by public school boards, see Valente, *LAW IN THE SCHOOLS* (1987) at pp.66-120. For a discussion of nonpublic schools generally, see Mawdsley, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* (1989).

³⁰ Ill. Ann. Stat. ch. 122 § 24-24 (Smith-Hurd Supp. 1989). This statute deals with the status of public school personnel in handling discipline in the public schools and thus the reference to transportation is somewhat strained. For a discussion of the concept of *in loco parentis*, see Mawdsley, *In Loco Parentis: A Balancing of Interests*, 61 ILL. B.J. 638 (1973).

³¹ *Gerard v. Monrovia City Sch. Dist.*, 264 P.2d 115 (Cal. Ct. App. 1954).

³² 407 So. 2d 759 (La. Ct. App. 1981).

³³ *Id.* at 763.

decisions need to be assessed in light of traditional tort liability concepts (duty, reasonable person, foreseeability, and proximate cause) school administrators will find a great deal of similarity to a wide variety of other school areas of potential liability.³⁴

An example of the application of traditional tort concepts to a transportation decision is evident in *Toeller v. Mutual Service Casualty Insurance Company*.³⁵ In *Toeller* the public school district had contracted with a private bus company to provide bus transportation and thus the driver was not a school district employee. The bus driver in *Toeller* had reprimanded two students on his bus and informed them that they would not be permitted to ride the bus the next day. Neither the parents nor the school authorities were informed of the discipline and undisputed testimony indicated that such discipline under existing district policy was the province of the administrator rather than the driver. One of the boys did not tell his parents and the next day borrowed his brother's bicycle to ride to school; while en route he swerved into the path of a truck and suffered extensive head injuries. The bus driver, his contract employer, and his insurer were found 93% negligent on the theory that "a defendant's duty is established when it can be said that it is foreseeable that his act or omission may cause harm to someone."³⁶ While the school district had no liability in *Toeller*, the case nonetheless highlights the risk of liability where school district policy concerning the duty to provide transportation has been flagrantly violated.³⁷

2. Bidding Transportation Services

Many school districts are no longer able or willing, because of limited finances or administrative difficulty in administering or scheduling buses, to maintain their own bus services and therefore they bid those services to private transportation contractors.³⁸ By statute in virtually every state, procedures have been established for the bidding of transportation contracts. While the specific language for bidding requirements varies from one state to another, generally, bidders must be "responsible"

³⁴ For a discussion of many of the areas which tort liability touches in school management, most of which do not involve statutory mandates, see Mawdsley, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 8-46 (1989).

³⁵ 340 N.W.2d 923 (Wis. Ct. App. 1983).

³⁶ *Id.* at 925.

³⁷ Regarding a school district's authority to suspend rebellious students from bus service, see *Rose v. Nashua Bd. of Educ.*, 679 F.2d 279 (1st Cir. 1982).

³⁸ The contracting of bus services does not absolve the school district of responsibility and liability if statutory safety standards are not complied with by the contractor. See *Settles v. Incorporated Village of Freeport*, 503 N.Y.S.2d 945 (Sup. Ct. 1986).

within the definition of the statute before their bids have to be considered.³⁹ The opportunity to submit a bid does not rise to the level of an entitlement as to invoke the "property interests" protected by the Fourteenth Amendment.⁴⁰

Litigation concerning bidding of transportation services can focus on a number of issues, one of which is access to information. Generally, all bidders are entitled to the same information from the school district so that all of the prepared and submitted bids address the specific services the district wishes to contract and represent competitive prices for performing those services. In *Willett Motor Coach Co. v. Board of Education of the City of Chicago*,⁴¹ an unsuccessful bidder on contracts for transportation of handicapped public school children had received the first solicitation of bids and the second amendment from the board. What the bidder did not receive, and what the board could not prove it had sent,⁴² was a first amendment providing that either the board or the contractor could cancel all contract obligations on 60 days notice. This amendment altered the terms of the first solicitation which had provided that only the board could cancel the contract on 60 days notice. The unsuccessful bidder was able to secure an injunction ordering a new bidding process because the information in the first amendment would have provided him with leverage in negotiating a new contract with his union drivers. In addition, the unsuccessful bidder was able to prove that with knowledge of 60 days cancellation privilege his bid would in fact have been one million dollars lower than the bid accepted.

Failure of a board to furnish information to a bidder is actionable only if bidders are treated in an unequal manner. In *We Transport v. Board of Education of Uniondale*,⁴³ the board's furnishing a copy of the current year's daily trip schedule to the plaintiff was not required since the daily trip schedules for the following year on which the bids were being submitted had not been provided to any of the parties.

³⁹ For a particularly expansive definition of "responsible bidder", see N.D. Cent. Code § 15-34.2-08 (Supp. 1991) ("school board shall let the contract ... to the lowest responsible bidder who furnishes a bond ... and who agrees to use a vehicle which, in the judgment of the board, meets standards imposed by the superintendent of public instruction ... is a safe comfortable and suitable vehicle for the purpose, and who names one or more drivers who, in the judgment of the board, are competent and responsible.")

⁴⁰ See *Rice v. Scott County Sch. Dist.*, 526 N.E.2d 1173 (Ind. Ct. App. 1988), (following *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)).

⁴¹ 431 N.E.2d 1190 (Ill. App. Ct. 1982).

⁴² This case is well worth reading regarding the importance of a regular routine in handling incoming mail and how such a routine is proved in a lawsuit. *Id.* at 1193-94.

⁴³ 462 N.Y.S.2d 286 (App. Div. 1983).

Courts seem to grant considerable latitude to school boards in reviewing and selecting the low bidder. A school board can permanently enjoin a school bus transportation company from discontinuing or interrupting certain school transportation services where the school board is exercising its "legal duty to modify its bid specifications as required by the public interests."⁴⁴ The key element always seems to be whether the action of the school board is made in good faith to promote the best interests of the school district, especially where the effect of the board's decision will be a saving to the taxpayers.⁴⁵ Generally, absent statutory authority to the contrary, the power of school board members to reject any and all bids cannot be questioned unless their action is arbitrary, capricious, or unreasonable.⁴⁶ A court's purpose in reviewing board rejection of bids is solely to determine whether "the board's decision is supported by substantial evidence... and [whether] the board has complied with all relevant rules of law and procedure, including its own rules."⁴⁷

The burden of proving that the administrative action of the School Board was arbitrary and capricious or an abuse of discretion falls upon the party attempting to upset the administrative order."⁴⁸

While a school board cannot alter a bid for one of the bidders so as to give that bidder an advantage over others, a board does have some discretion in working with the successful bidder, once that determination has been made. Thus, issuance of a bid without requiring security from the successful bidder, at least in New York, is a matter of school board discretion.⁴⁹

In *Walt Bennett Ford v. Pulaski County Special School*,⁵⁰ the low bidder was permitted, after bids were submitted but prior to awarding of the contract, to furnish proof that he was a franchised dealer and to prove that he was entitled to claim a five percent preference for Arkansas residents, both of which were statutory requirements. Although the

⁴⁴ Board of Educ., Smithtown Cent. Sch. Dist. v. Bimco Industries, Inc., 444 N.Y.S.2d 718 (App. Div. 1981).

⁴⁵ State statutes usually require school boards to select the lowest bidders. See e.g., Ind. Code Ann., § 20-9.1-2-9 (West 1984) (contract "shall be awarded to lowest responsible bidder"); Ill. Ann. Stat. ch. 122 § 10-20.21 (Smith-Hurd 1989) ("let all contracts...to the lowest responsible bidder").

⁴⁶ See 64 AM. JUR. 2d *Public Works and Contracts* § 75, 76.

⁴⁷ Metropolitan Sch. Dist. of Martinville v. Mason, 451 N.E.2d 349 (Ind. Ct. App. 1983).

⁴⁸ *Id.* at 354.

⁴⁹ Wilson Omnibus Corp. v. Fallsburg Cent. Sch. Dist., 563 N.Y.S.2d 365 (App. Div. 1990).

⁵⁰ 624 S.W.2d 426 (Ark. 1981).

Arkansas Supreme Court indicated that school board members could be sued individually for violation of the state's bidding requirements, the court found for the board and school district in this case because the action of the board and school officials "saved money for the taxpayers."⁵¹ Had the contract not been offered to the low bidder as was required by the state statute, or had the outcome in this case been different, the board and school officials might have faced an action for tortious interference with contractual rights.

A school district's discretion notwithstanding, it must issue contracts consistent with the terms of the bid or face injunctive relief or damages. In *People ex rel. Willett Motor Coach Co. v. Board of Education of City of Chicago*,⁵² a school bid solicitation called for bids by bus categories and provided that summer school service would be awarded to "successful bidders" of services for the regular school year. When plaintiff was awarded a contract as a "successful bidder" for two of the regular year categories but later was denied the summer service contract in the same categories, the company filed suit and collected damages for breach of contract. The state appeals court reasoned that once the bus company became a "successful bidder" under the terms of the regular year contract, and by definition a "responsible bidder" under the state statute,⁵³ the board had to offer the same bidder the summer school transportation service contract in the same categories that the regular year contract had been offered.

Renegotiation of a transportation contract may be permitted by state statute without the requirement that bids be resubmitted, even though the renegotiated contract occurred after the successful bidder had been selected. But the range of topics that can be the basis of renegotiation without the resubmission of bids may be narrowly defined by the statute. Indiana statute provides that

The governing body may require the school bus driver or fleet contractor to furnish equipment with greater seating capacity at any time. When a school bus driver or fleet contractor is required to furnish different equipment during the term of the contract, the contracting

⁵¹ *Id.* at 429.

⁵² 524 N.E.2d 1155 (Ill. App. Ct. 1988).

⁵³ See Ill. Ann. Stat. ch. 122 § 10-20.21 (West Supp. 1991). Illinois is consistent with most states in requiring that a bidder to whom a contract is submitted must be "responsible", which goes beyond the monetary amount of a company's bid, and considers also financial solvency and ability to perform the contract in a timely and responsible manner.

parties may mutually agree to the cancellation of the existing contract, and renegotiation of new contract for the balance of the term under the original contract.⁵⁴

In *Jackson v. Union-North United School Corporation Board of Trustees*,⁵⁵ a school district had renegotiated six contracts based on the purchase of new buses with the same seating capacity as the buses owned by the contractor at the time the contractor's transportation bid had been accepted. The Indiana Court of Appeals interpreted narrowly its statute and limited renegotiation without resubmission of bids only to situations where school boards require buses with seating capacities different than the original contract. Although Jackson was appealed after a summary judgment for the school district, the appeals court's unequivocal interpretation of the state statute and the school district's apparent violation of the statute seemed to indicate that the trial court on remand would be expected to enter judgment against the school district, and thus the district would have to resubmit contracts for rebidding.⁵⁶ Failure of a school district to rebid on an optional extension of an existing contract may also run afoul of the state's bidding requirements. In *Edwards v. City of Boston*,⁵⁷ the city had a one-year contract with a private bus contractor to provide transportation services with a one year extension at the option of the city. Failure of the city to solicit bids for the extension was held to be a violation of the state's Uniform Procurement Act.⁵⁸

The bidding authority carries the responsibility to monitor satisfactory compliance with state statutes and the terms of the contract. Thus, a school board can rescind a transportation contract when it learns that the successful bidder was not a "responsible bidder" within the terms of the statute due to a prior criminal conviction of its principal member. Such a board determination was held to have a rational basis.⁵⁹ In addition, a school board can rescind a contract where state inspections showed bus

⁵⁴ Ind. Code Ann. § 20-9.1-2-13 (West 1984). Indiana also permits alteration of existing contracts to pay additional compensation to bus drivers where a bus route is longer than the originally contracted route (§ 20-9.1-2-12) and permits amendment of an original contract where adjustments are needed due to fluctuations in the cost of fuel (20-9.1-2-13.5).

⁵⁵ 582 N.E.2d 854 (Ind. Ct. App. 1991).

⁵⁶ A strong dissent in Jackson rejected the narrow interpretation of the state statute and read two, instead of one, areas of discretion where school boards could renegotiate transportation contracts: "seating capacity" and "different equipment". Also, the dissenting justice disputed whether the majority's assumption that the new buses were not required by the school district could be resolved at all at the appeals court level when that issue had not been raised at the trial by either party. *Id.* at 859-60.

⁵⁷ 562 N.E.2d 834 (Mass. 1990).

⁵⁸ Mass. Gen. Laws Ann. ch. 30B, § 1 *et seq.* (West Supp. 1991).

⁵⁹ *Crescent Bus Corp. v. Board of Educ. of the City of New York*, 463 N.Y.S.2d 259 (App. Div. 1983).

defects that could have been eliminated by proper maintenance and the contract had placed the responsibility for such maintenance on the contractor.⁶⁰

3. Alternate Means of Transportation

Not all school children are transported to school by school buses owned by the school district or contracted with private bus contractors. The tendency for school districts in larger cities with mass bus transportation to designate such transportation for student use has raised a number of interesting legal questions. The difficulties in reconciling the use of mass transportation to transport students with statutory provisions that require school buses to meet a host of special safety specifications, such as color and special flashing lights, surfaced in *Metropolitan Atlanta Rapid Transit (MARTA) v. Tuck*.⁶¹ The Atlanta school board had contracted with MARTA to alter one of its normal daily runs to transport students to and from public schools from designated drop-off or pick-up points. Even when the MARTA bus was carrying school children pursuant to this arrangement, it was still part of the MARTA system and members of the public could ride the bus. No changes had been made to the MARTA bus to cause it to look like a traditional school bus when students were being transported. After a child disembarking from the MARTA bus ran in front of the bus and was struck by a car, the parents brought suit against MARTA alleging that their bus was not identified as a school bus as required by state statute. Not only did the Georgia Court of Appeals determine that the MARTA bus was a school bus within the meaning of the statute, but it decided that operating the bus on a special bus route without displaying the required sign was negligence *per se*. Although neither the school board nor school officials were parties to this lawsuit, presumably because they had no notice that the bus was in violation of state law,⁶² the prospect for future litigation would have probably been fairly good, had not the Georgia legislature taken prompt action to exclude all local transit systems from all identification and equipment requirements for school buses.⁶³

In a more recent Minnesota case, however, a public school district was directly involved in litigation concerning the use of public transit

⁶⁰ Childress v. Sullivan County Bd. of Educ., 771 S.W.2d 411 (Tenn. Ct. App. 1988).

⁶¹ 292 S.E.2d 878 (Ga. Ct. App. 1982).

⁶² For liability of school boards for actions of those with whom it contracts, see *Settles v. Incorporated Village of Freeport*, 503 N.Y.S.2d 945 (Sup. Ct. 1986) and *Peters v. Wayne State Univ.*, 691 F.2d 235 (6th Cir. 1982).

⁶³ See Ga Code Ann. § 40-8-110 through 40-8-115 (1991).

buses as school buses. In *Jam v. Independent School District No. 709*,⁶⁴ a school district was a defendant in a wrongful death action where a student had been killed while crossing a street after having been discharged from a Duluth Transit Authority (DTA) bus which was used to transport children to a junior high. Even though the DTA bus was theoretically open to the general public and the deceased child who lived within the two mile maximum walking distance had to pay his own fare, the DTA bus was determined nonetheless to be a school bus within the statutory definition because the ridership was exclusively students, the bus operated on scheduled bus routes, and it stopped at places not designated as public bus stops. In overturning a summary judgment for the school district, the court ruled that a question of fact was raised since the injury suffered by the child was precisely the type of harm envisioned by state statutes that established requirements for school bus color, signalling arm, and flashing lights.

Pennsylvania appears to have adopted by statute a position somewhere between that of the Minnesota and Georgia cases discussed above. Pennsylvania provides that "[b]uses, other than school buses, operated by urban mass transportation for the exclusive or nonexclusive transportation of school children may, at the option of the urban mass transportation system, be equipped with flashing red and amber lights and may be identified by appropriate labeling as carrying school children."⁶⁵

A persistent problem for school authorities has been the use of private cars for school and school-related functions. Not surprisingly, injured plaintiffs have sought to extend their reservoir for financial recovery of judgments to the liability insurance coverage of the school district. In *Caston v. Buckeye Union Insurance Company*,⁶⁶ an injured plaintiff was able to satisfy the bulk of his \$314,650 judgment against the school's insurer because the private car in which the plaintiff had been injured was considered to be a "hired automobile." In *Caston* the person in charge of a field trip had asked for volunteers to drive their family cars. Once at the field trip destination a driver and plaintiff received permission to leave and get a hamburger; the accident occurred en route. The court categorically rejected the argument that the trip to get a hamburger was a frolic and instead relied on the following language in the school's insurance policy:

⁶⁴ 413 N.W.2d 165 (Minn. Ct. App. 1987).

⁶⁵ Pa. Cons. Stat. Ann. tit. 75 § 4553 (Purdon Supp. 1991) (if equipment of labeling is used as authorized by statute, it must comply with state law).

⁶⁶ 456 N.E.2d 1270 (Ohio Ct. App. 1982).

Insured means . . . (c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation...is within the scope of such permission.

. . . Hired automobile means an automobile not owned by the named insured which is used under contract in behalf of, or loaned to, the named insured . . .⁶⁷

Two factors seemed to satisfy the court that the student's car was a "hired automobile": the car was being used as a substitute vehicle for school buses which were not available for the field trip; and the school official had made a request for volunteers.

Normally, the mere fact that students use their own cars for a school-sponsored activity does not in itself generate liability.⁶⁸ However, a school can be liable if it provides transportation but an exception is made for one student⁶⁹ or if a student's unauthorized use of his car is known by school officials.⁷⁰

Very probably in response to concerns regarding school district liability for the use of private vehicles, a South Carolina vocational center adopted a driving/riding policy which required parental permission before students would be permitted to drive or ride in cars from the high school to the vocational center, rather than use the bus provided by the school district. In rejecting a tort claim by a student injured in an automobile accident during a week when the school failed to check the passes issued pursuant to parental permission, the South Carolina Supreme Court tacitly upheld the Policy while finding the failure to check passes for one week not to be gross negligence so as to waive governmental immunity.⁷¹ However, failure of a school to enact a driving policy should not necessarily create liability. In *Capuzzi v. Heller*,⁷² plaintiffs injured as a result of two vo-tech uninsured students racing in their cars between the high school and the vo-tech school unsuccessfully alleged school district immunity waiver under either "negligent entrustment" or "employee" theories.⁷³ In denying recovery, the court found that the power of the

⁶⁷ *Id.* at 1271. (emphasis in original).

⁶⁸ *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Rauls v. Dugas*, 398 So. 2d 630 (La. 1981).

⁶⁹ *Williamson v. Board of Educ. of Berne-Knox*, 375 N.Y.S.2d 221 (1975).

⁷⁰ *Sumter County v. Pritchett*, 186 S.E.2d 798 (S.C. 1971).

⁷¹ *Richards v. Hambright*, 374 S.E.2d 296 (S.C. 1988).

⁷² 558 A.2d 596 (Pa. Commw. Ct. 1989).

⁷³ The Pennsylvania immunity statute exceptions were not at all supportive of plaintiffs' position. See Pa. Stat. Ann. tit. 42 § 8501 (employee a person "acting on behalf of a government unit") and 8542(b) ("operation of any motor vehicle in the possession or control of the local agency") (West 1982).

school district to refuse students to drive cars does not equate to negligently entrusting the students' own cars to themselves and the lack of any control by the district over student operation of their cars obviates any possibility of an employment relationship.

At least one state, Florida, has approached the problem of use of private cars from a different perspective. Rather than having to await judicial determination as to whether a private vehicle is being used for school business, the Florida legislature has accorded "parents, guardians or other responsible adults who provide transportation in privately owned vehicles...the same exposure to, and protection from, risks of personal liability as do school district employees acting in the scope of their employment."⁷⁴ While this type of statute would probably not resolve the student accident cases presented above, the statute should have the salutary effect of encouraging "responsible adults" to volunteer their time and automobiles to assist financially strapped schools in providing activities external to the school.

Because of the expense and inconvenience of using buses on field trips and the undesirability of using private cars, some schools have turned to leasing or renting vans for such trips. Even this alternate transportation option is not without difficulties. In *Whittington v. Sowela Technical Institute*,⁷⁵ a husband in a wrongful death action on behalf of himself and his minor son was able to recover a judgment in excess of \$300,000 against the school where his deceased wife had been a nursing student, as well as the school's liability insurer. The feature which has made this case so significant is that the death occurred on a field trip for which the school had rented a van that carried its own liability insurance. In this case the deceased student had participated in a one day hospital field trip that was virtually mandatory and for which each student received twelve hours credit. The school (Sowela) placed certain restrictions on field trips: the trip had to have an educational purpose relating to nursing; travel had to be done on a Friday and had to be completed in one day; the students could not travel in their private vehicles; and the trip had to meet with the approval of Sowela. Prior to departure on the field trip each student including the deceased had completed the following "release" form:⁷⁶

⁷⁴ Fla. Stat. Ann. § 234.02(3) (West Supp. 1992).

⁷⁵ 438 So. 2d 236 (La. Ct. App. 1983).

⁷⁶ Id. at 242. The court's discussion of the enforceability of the release is well worth reading, since under Louisiana law a release is considered to be a contract and this release was unenforceable because "the parties were not dealing at arm's length and upon an equal footing." For discussions of exculpatory documents, see Henderson, Golanda, and Lee, *The Use of Exculpatory Clauses and Consent Forms by Educational Institutions*, 67 EDUC. LAW RPTR. 13 (1991); Mawdsley, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 2-8 (1989).

Sowela Technical Institute
Practical Nursing Department

I, Wanda Whittington, voluntarily agree to participate in the following activity:

List activity—M.D. Anderson Senior Trip
place— Houston, Texas
date— 4-6-1979

and hereby relieve Sowela Technical Institute of any and all liability associated with the above.

s/ Wanda Whittington
Name
4-2-1979
Date

In preparation for the trip, one of the instructors, Jean Teel, rented a van from a local rental company, signed in her own name as the customer and paid for all the charges; Sowela received no bills. The rental company's contract provided:

Customer is covered by an automobile liability insurance policy with limits of liability for bodily injury including death to the GREATER OF:

- a) The limits of liability under the Customer's personal automobile liability insurance policy in force as of the date of the execution of this Agreement or*
- b) The statutory limits prescribed under the Financial Responsibility Law or other applicable statute of the state in which the Vehicle is rented.*

PROVIDED HOWEVER that such limits shall not exceed \$100,000.00 for each person and \$300,000.00 for each accident and property damage of \$25,000.00 for each accident. A copy of said policy is available for inspection at the main office of Lessor . . .⁷⁷

The plaintiff in this case sought recovery from the rental company on the basis of the contract for the rental vehicle signed by Jean Teel and from the school on the theory that Jean Teel in renting the van was only an agent for the school. The trial court determined that Jean Teel's personal automobile liability insurance coverage was \$10,000 and therefore under the rental company contract, the company's liability was limited to that sum. In determining that the instructor, Jean Teel, was an agent for the school in renting the van, the court focused on the facts that twelve academic credits had been awarded for a trip that was far from voluntary and the expenses incurred by Teel and the other instructor on the trip had been reimbursed by the school. In holding the school to be independently negligent, the court declared that "Sowela owed a duty to its students to provide transportation under safe conditions."⁷⁸ That duty had been breached because the school (through its agent) had permitted 16 students and 2 instructors to be transported in a van designed to hold 15 persons over a highly traveled interstate highway for a great distance. In addition, the school by permitting the instructors to drive the van had not "properly fulfilled its duty of providing a trained driver, e.g. a licensed chauffeur...."⁷⁹

Whittington has elements that are troublesome for school districts and school officials. Two of the commonly stated reasons for using rental vehicles for school functions are to eliminate the high cost of professional licensed drivers and to pass on the insurance risk to the rental company's insurer. As is clearly indicated in *Whittington* rental companies can successfully reduce their insurance exposure by tying the rental vehicle's liability coverage to that of the person contracting for the vehicle. Unless the school district wants to contract directly for all rental vehicles, the best strategies to avoid the liability insurance exposure evidenced in *Whittington* would seem to be either to make certain the person renting the vehicle has adequate liability on his/her personal vehicle or to require persons renting vehicles for school functions to contract for the extended liability coverage provided by all rental companies. But the more troublesome aspect of *Whittington* is "the duty [of schools] to provide a driver qualified and trained in transporting a large group of students over a long distance on a heavily traveled interstate highway."⁸⁰ To the extent that this duty becomes recognized generally, the school districts face a number of options in managing field trips, all of which may be undesirable: bearing the higher cost of using a bus and a trained

⁷⁸ *Id.* at 247.

⁷⁹ *Id.*

⁸⁰ *Id.*

driver; using a number of private vehicles with the students as drivers; or not scheduling, or canceling, the field trip.

4. Bus Driver Requirements

The responsibility which school boards have to monitor school transportation involves also the obligation to check bus driver compliance with state requirements. All states require bus drivers to meet special qualifications set either by statute⁸¹ or state department of education regulations.⁸² Some of the litigation in this area involves attempts by state licensing agencies to suspend or revoke bus driver licenses. State licensing agency decisions to revoke licenses of bus drivers have been upheld on the grounds that the driver had a history of diabetes⁸³ or myocardial infarction,⁸⁴ that the driver had been convicted of a felony related to his license,⁸⁵ and that he had reached the age of 65.⁸⁶

School boards frequently become defendants when they seek to suspend or dismiss drivers who have been guilty of misconduct or who have violated an established state standard. Generally, courts appear to give great deference to the decisions of school boards. In one interesting case, a dismissed bus driver even attempted to sue (unsuccessfully) his union when the union had failed to file a grievance on his behalf.⁸⁷ A bus driver's dismissal has been upheld where the driver failed "to keep his school bus in a safe, comfortable, and practical operating condition" by not keeping the bus adequately repaired and by not furnishing adequate heat on cold days.⁸⁸ In addition, driver dismissals have been upheld for

⁸¹ *E.g.*, see Iowa Code Ann. § 321.376 (West Supp. 1991) (bus drivers have special license endorsement); Ind. Code Ann. § 20-9.1-2-10 (West 1984) (driver must have public passenger chauffeur's license).

⁸² *E.g.*, see Iowa Code Ann. § 285.5(2), 285.8(6)(f) (West 1988).

⁸³ *Jackson v. State*, 544 A.2d 291 (Me. 1988); *Commonwealth of Pa. v. Slater*, 462 A.2d 870 (Pa. Commw. Ct. 1983).

⁸⁴ *Huntsberger v. Commonwealth of Pa.*, 463 A.2d 1288 (Pa. Commw. Ct. 1983); *Commonwealth, Dep't of Transportation, Bureau of Traffic Safety v. Johnson*, 489 A.2d 960 (Pa. Commw. Ct. 1985). *Contra* *Appeal of Stober*, 546 A.2d 155 (Pa. Commw. Ct. 1988) (section 504 of Rehabilitation Act applied to Department of Transportation's regulations requiring revocation of license of driver with myocardial infarction; state failed to meet burden that driver was incompetent as driver); *Commonwealth, Dep't of Transportation, Bureau of Driver Licensing v. Chalfant*, 565 A.2d 1252 (Pa. Commw. Ct. 1989) (evidence of one seizure not sufficient to prove incompetence for license recall).

⁸⁵ *Gibson v. Transportation Comm'n*, 315 N.W.2d 346 (Wis. 1982) (armed robbery).

⁸⁶ *Maki v. Commissioner of Educ. of the State of N.Y.*, 568 F. Supp. 252 (N.D.N.Y. 1983), appeal dismissed 742 F.2d 1437 (2d Cir. 1984). *But see* *Ten Hoeve v. Board of Educ. of Dundee Cent. School Dist.*, 489 N.Y.S.2d 59 (N.Y. 1985) (school board policy of dismissing bus drivers at age 65 violative of federal and state handicapped acts).

⁸⁷ *Stempien v. Civil Serv. Employees Ass'n*, 458 N.Y.S.2d 381 (App. Div. 1982).

⁸⁸ *Sampson v. Administrator, La. Office of Employment Sec.*, 439 So. 2d 458 (La. Ct. App. 1983).

sexual harassment of children on the bus,⁸⁹ conviction of a felony within the previous five years,⁹⁰ conviction of driving under the influence,⁹¹ growing marijuana on their own property,⁹² letting children off at the wrong location,⁹³ changing the order of bus stops,⁹⁴ and for a single accident where the driver failed to yield the right-of-way.⁹⁵ The issue of drug testing for bus drivers has become controversial, and a determination as to whether school boards have to have probable cause prior to testing may well affect the outcome of such testing.⁹⁶

C. Care Owed to Students during Transportation

1. Selection of Bus Stops

Schools have responsibilities for students in a wide range of transportation situations from selection of bus stops to disembarkation. The extent to which responsibilities will be translated into school district liability depends on a number of variables.

Litigation concerning selection of bus stops has generated a variety of concerns. In *Brooks v. Woods*,⁹⁷ a bus stop was established and designated by the school district adjacent to an uncurbed, five-lane traffic artery with a 45 MPH speed limit. The school bus arrival coincided with the normal rush hour traffic. The plaintiff child struck and injured by a car while waiting for the school bus, "was a quiet nine-year-old having the skills and capacity of a child of only six years."⁹⁸ The trial court granted the school district's demurrer, inferentially holding that the district had "no legal duty to the child under the facts."⁹⁹ In overruling the trial court, the appeals court held "that a school district's legal duty to exercise reasonable care extends to any activity of school bus transportation which lies outside the control of the parents."¹⁰⁰ The *Brooks* appeals

⁸⁹ *Green v. Board of Sch. Comm'rs of the City of Indianapolis*, 716 F.2d 1191 (7th Cir. 1983).

⁹⁰ *Hill v. Gill*, 703 F. Supp. 1034 (D.R.I. 1989).

⁹¹ *Patton v. Springfield Bd. of Educ.*, 531 N.E.2d 310 (Ohio 1988).

⁹² *Holsapple v. Arlington Cent. Sch. Dist.*, 523 N.Y.S.2d 600 (App. Div. 1988).

⁹³ *Tyson v. Hess*, 487 N.Y.S.2d 206 (App. Div. 1985).

⁹⁴ *Briganti v. Board of Educ., Deer Park Union Free Sch. Dist.*, 500 N.Y.S.2d 740 (App. Div. 1986).

⁹⁵ *Ivy v. Natchitochos Parish Sch. Bd.*, 428 So. 2d 1332 (La. Ct. App. 1983).

⁹⁶ *See Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (dismissal of bus driver on basis of unconfirmed urinalysis test secured without probable cause of abuse held to be arbitrary and capricious).

⁹⁷ 640 P.2d 1000 (Okla. Ct. App. 1981).

⁹⁸ *Id.* at 1001.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1002.

court further noted that a school district "must provide a reasonably safe bus stop where children may wait for the bus with reasonable safety, having due regard for their age, immaturity and inexperience."¹⁰¹ Similarly, in *Duval County School Board v. Dutko*,¹⁰² a school district was liable for a \$175,000 damage award for the death of a 12-year-old student where the district had continued to maintain a bus stop at the same location, despite prior near misses and the absence of any traffic signals, signs, markers or barriers designating the area as a school bus stop. In another case, a material issue of fact was raised regarding selection of a bus stop where the school district knew most disembarking students would have to cross a railroad track and where an alternative disembarkation location existed which did not require the students to cross the tracks.¹⁰³

The conclusion reached in the above cases is by no means subscribed to in every jurisdiction. In *Hackler v. School District No. 500 of Kansas City*,¹⁰⁴ a school district had no liability for a student injury where parents had been requested to select the bus stop on the same side of the road nearest their home and the bus driver had no knowledge that the parents of the injured child had selected a bus stop across the street from their home. But the court in *Harrison v. Escambia County School Board*,¹⁰⁵ was far more explicit regarding the policy issues pertaining to selection of bus stops. In *Harrison*, a child had been struck and killed while walking along a busy street to a school bus stop. Plaintiffs pleaded breach of a Florida statute as the basis of their negligence complaint.

Each district school board shall establish school bus stops as necessary at the most reasonably safe locations available. Where unusual traffic hazards exist at school bus stops on roads maintained by the state outside of municipalities, the Department of Transportation, in concurrence and cooperation with and upon request of the district school board, shall place signs at such bus stops warning motorists of the location of the stops.¹⁰⁶

The gravamen of the complaint in *Harrison* was that the school board failed to direct warning signs to be placed near the bus stop or to find an alternate safe bus stop. In sustaining the trial court's demurrer to

¹⁰¹ *Id.* See also *School Bd. of Broward County v. Surette*, 394 So. 2d 147 (Fla. Dist. Ct. App. 1981) (school district liable for maintaining a bus stop near a vacant lot with an overgrown and debris-strewn lawn that obscured the waiting children from approaching motorists).

¹⁰² 483 So. 2d 492 (Fla. Dist. Ct. App. 1986).

¹⁰³ *Garrett v. Grant Sch. Dist. No. 124*, 487 N.E.2d 699 (Ill. App. Ct. 1985).

¹⁰⁴ 777 P.2d 839 (Kan. 1989).

¹⁰⁵ 419 So. 2d 640 (Fla. Dist. Ct. App. 1982).

¹⁰⁶ Fla. Stat. Ann. § 234.112 (West 1989).

the complaint, the state court of appeals found the determination of bus stops to be a discretionary function and thus protected by governmental immunity. However, in affirming dismissal of the complaint the court made some practical policy observations.

It appears to us that to require the school board to decide on school bus stop locations under the threat of tort liability in the event a judge or jury at some later date might determine that the chosen location constituted a safety hazard to an individual child injured en route to it, would present some difficulties. It is obvious that some potential for injury to a child would exist at any location where motor traffic exists yet it would be totally impractical and indeed impossible to locate a bus stop at any place where this would not be true. Furthermore, a location deemed "most reasonably safe" for some could pose safety problems different in kind and degree for other pupils, given the fact that they very likely approach the bus stop from different directions, and by different routes. Finally, one might easily conclude that the safety of each child could be insured to the utmost only by requiring the bus to stop at each child's home, yet it is equally apparent that this would be totally impracticable because of other factors, such as the length of time the children would be required to endure the bus ride, the potential for increased traffic congestion owing to excessive bus stops, and the increased hazards generated by the bus leaving and re-entering well-traveled routes, to name but a few.¹⁰⁷

While the opinion expressed in the quotation above may have the appearance of being distant and aloof from the very personal and sensitive issue of student safety, the court does express clearly the practical difficulties in balancing a school district's duty to provide transportation with choices that must be made in implementing that duty. Schools have generally never been found to be insurers of the safety of students.¹⁰⁸ Thus, a school district did not breach its duty of care when a school girl, who had missed the bus at her regular stop, was struck and injured hurrying to catch the same bus at a later stop. The school district practice of permitting students to catch a bus at a later stop could not be the basis for

¹⁰⁷ *Harrison*, 419 So. 2d at 644.

¹⁰⁸ See generally, Mawdsley, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 8-15 (1989); Valente, *EDUCATION LAW: PUBLIC AND PRIVATE*, II, 198-209 (1985).

liability in this case because the district had never communicated the practice to the public so as to form the basis of parent/student reliance.¹⁰⁹

Selection of a bus stop raises also the question regarding school district responsibility for the safety of students gathered there. In *Fornaro v. Kerry*,¹¹⁰ a kindergarten student waiting for his bus and struck in the face by a rock thrown by an older ten-year-old boy also waiting at the same bus stop for a separate elementary school bus failed in his allegation that the school district owed a duty not to have students of different ages waiting at the same bus stop because "the students were not yet in the physical custody or control of the school district."¹¹¹ However, in *O'Campo v. School Board of Dade County*,¹¹² a school district was not entitled to summary judgment where an eleven-year-old girl was raped waiting at a bus stop assigned by the school to catch a bus at 6:55 a.m. to a special arts program for gifted children. The court reasoned that the school district owed a duty to children entrusted to its care, in this case a child waiting where the district instructed her to wait, and the district may have breached that duty when it failed to provide any supervision at all at the bus stop.

2. Responsibility while En route to and from School

Once school children are on a school bus, the school has a duty to exercise ordinary, reasonable care to deliver them to their destination. Where children are involved, "the duty to exercise due care should be proportioned to the child's incapacity to adequately protect himself."¹¹³ The duty can also vary depending on whether the school district owns and operates its own buses or rents the buses from a private contractor. In *Gallant v. Gorton*,¹¹⁴ a private bus company was held to the same high duty of care as a common carrier (such as a railroad), rather than the lower ordinary duty of care owed by a public school district, and thus the company could be liable for an intentional act committed by the bus driver toward a student (rape).

¹⁰⁹ *Di Cerbo v. Raab*, 516 N.Y.S.2d 995 (App. Div. 1987).

¹¹⁰ 527 N.Y.S.2d 61 (App. Div. 1988).

¹¹¹ *Id.* at 62.

¹¹² 89 So. 2d 323 (Fla. Dist. Ct. App. 1991).

¹¹³ *Sharpe v. Quality Educ., Inc.*, 296 S.E.2d 661, 663 (N.C. Ct. App. 1982). *See also*, *Hawkins County v. Davis*, 391 S.W.2d 658, 660 (Tenn. 1965) ("Reasonable and ordinary care under the circumstances, when one of the circumstances is that the care of a child of tender years is entrusted to the school bus driver, requires that the driver exercise special care proportionate to the age of the child and its ability, or lack of ability, to care for itself."). In addition, *see Cartwright v. Graves*, 1845 S.W.2d 373, 377 (Tenn. 1994) (six-year-old "a wholly irresponsible age" and bus driver liable for failure to warn child as he alighted from bus of approaching truck.)

¹¹⁴ 581 F. Supp. 909 (D. Mass. 1984).

One of the most recent areas of litigation concerns safety features on buses, such as passenger seat belts. While most states seem to require seat belts for school bus drivers,¹¹⁵ none to date seems to require passenger seat belts.¹¹⁶ In *Dentson v. Eddins & Lee Bus Sales, Inc.*,¹¹⁷ plaintiffs representing children injured in a school bus collision with an automobile sought to extend the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) to cover the manufacture and sale of school buses without seat belts. In ruling against the plaintiffs, the Alabama Supreme Court held:

We, therefore, find that by expressly mentioning driver's seat belts in the school transportation chapter of our Code, the legislature impliedly excluded the passenger seat belt as a necessary item on Alabama school buses....[T]he legislature's pronouncement is conclusive: a school bus in Alabama may not be found to be defective for purpose of the AEMLD merely because it is not equipped with passenger seat belts.¹¹⁸

In transporting school children, school districts can be expected to take whatever means are necessary to prevent reasonably foreseeable accidents. In *Arnold v. Hayslett*,¹¹⁹ a school had assigned a teacher to serve as monitor in assisting buses to pull safely out of the school parking area. The monitor's function was to give directions to the bus driver as he backed up the bus and to warn students to keep their heads and arms in the bus while it was in motion. After giving several warnings to a number of students to keep their heads and arms in the bus, the monitor signalled for the bus to back up; suddenly a 12-year-old student stuck his head out of a window and was fatally injured when his head struck a guy wire in close proximity to the bus. In holding for the school district, the court observed that school buses are not common carriers and thus schools owe only "ordinary reasonable care under the circumstances."¹²⁰ In this set of facts, the deceased student's age plus repeated warnings by the monitor

¹¹⁵ E.g., Ala. Code § 16-27-6 (1988).

¹¹⁶ E.g., Iowa Code Ann. § 321.445 (2)(d) (1987) (excludes "passengers on a bus" from statute requiring use of seat belts/safety harnesses.)

¹¹⁷ 491 So. 2d 942 (Ala. 1986).

¹¹⁸ *Id.* at 944. For Alabama statute citation see *supra* note 115.

¹¹⁹ 655 S.W.2d 941 (Tenn. 1983).

¹²⁰ *Id.* at 944.

were enough to make the student's action proximate contributory negligence, thus precluding all recovery under Tennessee law.¹²¹

Control of student on buses has been the source of some litigation but certainly not to the extent that lawsuits occur alleging lack of supervision on school premises.¹²² In *Blair v. Board of Education of Servurne-Earlville Central School*,¹²³ a student sustained permanent injury to his eye when struck by an object thrown by another student. In affirming the judgment in excess of \$100,000 against defendant school district the court noted that the driver had been advised at least 15 minutes prior to the injury of disruptive behavior but had failed to take any action to stop it. Perhaps in response to unruly behavior on buses and anticipated liability for student injuries, some states have authorized the use of volunteers to ride buses and assist in maintaining order.¹²⁴

While unforeseen occurrences can arise, bus drivers are agents of the school¹²⁵ and their actions or non-actions can generate liability for the school. In *Scott v. Thompson*,¹²⁶ a school district was liable for a \$65,000 damage award where a student left the bus and was hit by a car after the bus driver left the bus with students on it and went into a garage for a cup of coffee. However, a school district, in *Johnson v. Carthell*,¹²⁷ was exempt from liability under governmental immunity when a bus driver held one of the students (who apparently was the nonaggressor) in an altercation so that the other student took advantage of the situation and struck the student being held in the eye. Missouri statutes created an exception to governmental immunity for:

¹²¹ Tennessee is not a comparative negligence state but it does have a remote contributory concept which permits mitigated recovery of damages. In *Arnold* the trial judge had found the decedent guilty of remote contributory negligence and awarded \$40,000 to his next of kin, but both the court of appeals and the supreme court found decedent's negligence to be proximate thus preventing all recovery.

¹²² See generally, Mawdsley, *supra* note 108 at 38-46. The relative infrequency of lawsuits regarding student conduct on buses probably reflects in large part the fairly short period of time students ride buses.

¹²³ 448 N.Y.S.2d 566 (App. Div. 1982).

¹²⁴ E.g., Ohio Rev. Code § 3327.16 (Page 1990) (includes volunteer adults and responsible older students, but they are expressly not employees and are not compensated.)

¹²⁵ Schools cannot insulate themselves from liability by using private transporters. See *Whittington v. Sowela Tech. Inst.*, 438 So. 2d 236 (La. Ct. App. 1983) and *Caston v. Buckeye Union Ins. Co.*, 456 N.E.2d 1270 (Ohio Ct. App. 1982). The relationship between school-owned bus service and private bus service is not close enough to prevent eligibility of a driver for unemployment benefits when discontinued by school district and hired by private bus service. See *Town of Milton v. Director of the Div. of Employment Sec.*, 438 N.E.2d 71 (Mass. 1982).

¹²⁶ 363 N.E.2d 295 (Mass. Ct. App. 1977).

¹²⁷ 631 S.W.2d 923 (Mo. Ct. App. 1982).

Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course of their employment.¹²⁸

In *Johnson* the court interpreted its statute not to waive immunity for the school district because the driver's acts concerned actions in the bus, not operation of the bus.¹²⁹ However, even though the school district was immune from liability, the driver was still liable because he had failed to follow the prescribed written school district guidelines.¹³⁰ It is worth noting that the reason the bus driver in *Johnson* was not also included within the governmental immunity was because he was "required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed."¹³¹ A somewhat similar result was reached in *Toeller v. Mutual Service Casualty Insurance Co.*,¹³² where a bus driver and his independent bus contractor employer were 93 percent negligent for the injury which occurred to a boy during the time he was under suspension from the bus by the driver.¹³³

Handling unruly students on a bus has always been a problem. A unilateral decision by a bus driver to suspend a student from a bus would probably be extraordinary in any context, but especially in *Toeller* where the driver failed to notify the school district of his decision and the school district had established guidelines regarding the responsibility to transport children. School bus drivers, regardless whether employed by the school district or a private contractor, are required to follow district rules concerning handling unruly students on buses. Under one state's statute, the right of school authorities to suspend unruly students from a school

¹²⁸ Mo. Rev. Stat. § 537.600(1) (1988).

¹²⁹ Determination of what constitutes operation of a bus is frequently litigated, especially relating to the issue of government immunity. See *Van Dinh v. Forest Hills Pub. Schs.*, 341 N.W.2d 510, 513 (Mich. Ct. App. 1983) (failure to instruct adequately a boy who spoke little English on how to cross a busy street was not "negligent operation of a motor vehicle."). For further discussion, see *infra* notes 182-193 and accompanying text.

¹³⁰ *Johnson*, 631 S.W.2d at 927. (school district handbook provided that, "The driver shall report disorderly conduct to the proper authority.")

¹³¹ *Id.* at 927.

¹³² 340 N.W.2d 923 (Wis. Ct. App. 1983).

¹³³ There is no indication that the school district had ever been a party to this lawsuit.

bus has been upheld, even though the suspension was for five days and applied to all students on a bus route.¹³⁴

Occasionally, a bus driver may encounter a sudden emergency that requires immediate response and then the bus driver's and school district's liability will be determined by the reasonableness of the driver's response. In *Sparrow v. Forsyth County Board of Education*,¹³⁵ a student walking toward the front of a bus while the bus was still moving was injured when the driver suddenly applied the brakes after a snowball came through an open window and struck the driver on the side of the head. The driver jumped out of the bus, threw a snowball at the student who had hit him and upon reentering the bus found the injured student. The court determined the driver's throwing of a snowball to be, in effect, irrelevant to the question of negligence and found that in stopping the bus the driver:

acted as a person of ordinary care and prudence would have acted under similar circumstances. The snowball being thrown into the bus in front of the driver brought about a sudden emergency which caused the driver to quickly stop the bus. There was, therefore, no negligence on the part of the driver in stopping the bus suddenly.¹³⁶

In *Cogan v. Kal Leasing, Inc.*,¹³⁷ a bus driver did not have time to apply her brakes when a car turned sharply in front of her. Plaintiff-minor in the car, rendered quadriplegic as a result of the accident, alleged in her complaint that the bus driver would have had time to apply the brakes had she not had installed a block on the gas pedal to make driving more comfortable for her. In upholding a directed verdict for the school district the state appeals court found that the evidence clearly demonstrated that the sole proximate cause of the accident was the sharp turn in front of the bus, not the failure of the bus driver to apply the brakes. Similarly, in *Foster v. Craig Equipment Co.*,¹³⁸ neither the bus driver nor the school

¹³⁴ See *Rose v. Nashua Bd. of Educ.*, 679 F.2d 279 (1st Cir. 1982) (New Hampshire has a statute permitting school superintendent "to suspend the right of pupils from riding in a school bus when said pupils fail to conform to the reasonable rules and regulations" of the board, but even without the statute the Rose suspension would probably have been upheld because the board had conducted hearings and considered alternatives before it reached its decision to suspend the students.) See N.H. Rev. Stat. Ann. § 189:9-a (1989).

¹³⁵ 198 S.E.2d 762 (N.C. 1973).

¹³⁶ *Id.*

¹³⁷ 546 N.E.2d 20 (Ill. App. Ct. 1989).

¹³⁸ 550 So. 2d 818 (La. Ct. App. 1989).

district were liable in a comparative negligence state in a products liability case involving a stuck accelerator. Considering the short span of time during the emergency (less than one minute), the bus driver's actions in steering the bus, with the stuck accelerator and with screaming children, around cars until it struck a building was not negligent as a matter of law, even though she had failed to pull the emergency brake or hit the kill switch until a few seconds prior to impact.

But not every emergency is so sudden so as exculpate a school district from liability. In *Minton v. Saint Bernard Parish Board*,¹³⁹ a child injured after running into the path of a school bus won a \$200,000 judgment against the school board. In *Minton*, a school bus driver noticing a group of children ahead near the road slowed his bus to 40-45 miles per hour. A child suddenly darted across the road followed by plaintiff; the bus driver swerved his bus but plaintiff panicked and ran into the path of the swerving bus. The driver and school board alleged a sudden emergency existed whereby the driver "had to make a choice between the safety of his passengers (by slamming on the brakes) and the safety of the pedestrians."¹⁴⁰ The court rejected this dichotomy as false because the bus driver's failure to apply the brakes and reduce speed more significantly when he first saw the children was the real act of negligence. By waiting unnecessarily to brake, the driver placed himself in the position of having to make a choice.

Where events occur during a bus trip that could reasonably have been anticipated, courts are likely to find negligence. In *Sharpe v. Quality Education, Inc.*,¹⁴¹ a school bus operated by defendant's driver had a history of mechanical malfunctions, especially stalling. Rather than effect the necessary repairs, defendant's solution was to furnish the bus with a set of jumper cables. On the date when plaintiff was injured, defendant's bus had stalled three times during the morning run. After the third time, the driver sent the oldest student across a divided four-lane highway to call the school. The plaintiff, a younger 9-year-old student, was told she could not cross the highway with the older student but then when she exited the bus the driver told the older student to hold her hand crossing the street. On the way back to the bus, plaintiff was struck by a car when she stayed on the median after the older child had run across. In rejecting arguments that plaintiff was contributorily negligent or that the driver of the car was the intervening cause, the court found that evidence existed

¹³⁹ 416 So. 2d 167 (La. Ct. App. 1982).

¹⁴⁰ *Id.* at 168.

¹⁴¹ 296 S.E.2d 661 (N.C. Ct. App. 1982).

that the driver and school could have reasonably foreseen the accident when they continued to operate a bus which repeatedly had problems and when they allowed the plaintiff to cross the street after three warnings not to do so.¹⁴²

3. Responsibility for Disembarking Students

The responsibility of school districts in establishing bus routes carries with it the duty to deliver students to their designated bus stops¹⁴³ and to monitor the safety of students at the bus stop. In *Roberts v. Saint Bernard Parish School Board*,¹⁴⁴ an appeals court reversed summary judgment for defendant school board where a student had been permitted by the bus driver to leave the school bus at a bus stop other than his regular stop. The student had been injured while attempting to cross the street after the bus had left. What made the facts particularly damaging for defendant was that plaintiff's parents had repeatedly told the bus driver and the superintendent not to drop the student at any other than his assigned bus stop. *Roberts* indicates that dropping a student at a site other than his regular bus stop not only defeats the purpose of establishing bus routes, but also frustrates parents who entrust their child to the school "not only during school hours, but also while he [is] riding to and from school in a School Board bus."¹⁴⁵

¹⁴² This case reversed a summary judgment for the defendants so the court did not have to resolve the case on its merits.

¹⁴³ Guidelines for determining bus routes may be established by statute for state departments of education, e.g. Iowa Code Ann. § 285.8 (West 1988); Minn. Stat. Ann. § 123.39(1)(2) (West Supp. 1992), as well as local boards of education, e.g. Iowa Code Ann. § 285.11 (West 1988); Fla. Stat. Ann. § 234.02 (West Supp. 1992). Whether guidelines are established by statutes or regulations the standard is clearly to locate and operate routes "for the protection of the health and safety of pupils transported." Iowa Code Ann. § 285.8(3) (West 1988).

¹⁴⁴ 427 So. 2d 676 (La. Ct. App. 1983).

¹⁴⁵ *Id.* at 678. See also *Thompson v. Anderman*, 285 P.2d 507 (N. Mex. 1955) (bus driver liable as matter of law for allowing child of 13 with mental age of 10 to alight from bus at other than regular bus stop). Although not directly addressed in *Roberts* there is probably a difference in the degree of care owed to students in school as opposed to those transported home on a bus. Generally, a school is not liable if a student entrusted to the care of a school leaves the school without authorization and is subsequently injured. See *Levandoski v. Jackson City Sch. Dist.*, 328 So. 2d 339 (Miss. 1979) (school not liable for student killed after skipping out of classes); *Oglesby v. Seminole City Bd. of Instr.*, 328 So. 2d 515 (Fla. Dist. Ct. App. 1976) (no school liability for student killed on way home from school). *Contra* *Hoyem v. Manhattan Beach City Sch. Dist.*, 585 P.2d 851 (Cal. 1978) (school had duty to prevent students from skipping out of school before the end of the school day). Because school buses represent a smaller area to monitor, because students are on buses for a significantly shorter time than in school, and because egress is easier to monitor for buses, school districts should be more responsible for students who leave buses at authorized stops.

Of course, parents might be able to authorize that their child be left at a different school bus stop but a school district would be advised not to do so unless the bus driver is presented a note signed by the parent and an appropriate school official. Such change should apply only to established bus stops, never to locations not designated as bus stops. Since the selection of bus stops involves consideration of student safety as well as effect on traffic patterns, leaving a student at an unauthorized bus stop subverts the policies underlying the selection.

The responsibility of a school district at the point of disembarkation at a bus stop generally includes the safety of the child if he/she must cross the road.¹⁴⁶ Bus drivers and school districts will invariably be liable if the driver fails to use the flashing signal lights as required by statute to protect students exiting the bus and crossing the street at the bus stop.¹⁴⁷ The duty of a bus driver at a bus stop may extend to continue activation of flashers until a child has crossed a street, even though the child actually lives on the same side of a street as the bus stop. In *Farley v. El Tejon Unified School District*,¹⁴⁸ knowledge by the bus driver that a child who lived on the same side of a busy street as the bus stop nonetheless frequently crossed the street to meet family members after exiting the bus was sufficient to create a duty for the driver to continue the flashers until the child was completely across the street. The duty to continue activation of flashers which bus drivers owe to children riding the bus can also be extended to motorists. In *Clomon v. Monroe City School Board*,¹⁴⁹ a four-year-old child was struck by a motorist after the bus driver had deactivated the flashers but before the child had reached the side of the street opposite the bus. The Louisiana Supreme Court upheld not only a recovery against the school district on behalf of the injured child, but also an award for emotional and mental injuries against the district on behalf of the motorist whose car struck the child. Regarding the reliance that a motorist can place on the activation and deactivation of flashers, the court observed:

¹⁴⁶ *Nolan v. Bronson*, 460 N.W.2d 284 (Mich. Ct. App. 1990); *Johnson v. Scoboda*, 260 N.W.2d 530 (Minn. 1977).

¹⁴⁷ See *Hitchcock v. Garvin*, 738 S.W.2d 34 (Tex. Ct. App. 1987) (disputed evidence as to whether bus driver properly activated flashers on bus to indicate bus was slowing to stop and discharge children precluded summary judgment for the school district); *Croghan v. Hart County Bd. of Educ.*, 549 S.W.2d 306 (Ky. Ct. App. 1977) (bus driver negligent as matter of law for failure to activate flashers at bus stop). For an example of a statute, see Iowa Code Ann. § 321.372(1) (West 1985) ("At the point of receiving or discharging pupils the driver of the bus shall bring the bus to a stop, turn off the amber flashing warning lamps, turn on the red flashing warning lamps, and extend the arm.") See generally, *Slade v. New Hanover County Bd. of Educ.*, 178 S.E.2d 316 (N.C. Ct. App. 1971); *Taylor v. Patterson's Admr.*, 114 S.W.2d 488 (Ky. 1938); Iowa Op. Atty. Gen. (Dec. 5, 1980), (June 4, 1979), (Nov. 15, 1978).

¹⁴⁸ 274 Cal. Rptr. 780 (Ct. App. 1990).

¹⁴⁹ 572 So. 2d 571 (La. 1990).

[T]he motorist is required and entitled to rely for his safety, convenience and peace of mind upon the bus driver's performance of his duty to activate highly visible signals, await the child's safe passage and remain as stationary sentinel until the child's security is clearly assured....[I]t is evident that the bus driver's duty is owed not only to the careful motorist but also to the inattentive driver who may have relied on the busman's signals or lack thereof....[I]t would not be just to deny the motorist recovery for any damage attributable to the bus driver's negligence.¹⁵⁰

Following the line of cases discussed above, several general rules may help in reducing litigation. Schools need to use care to place bus stops whenever possible in places easily visible to approaching traffic and identify bus stop locations with appropriate signs. In addition to continuing use of the flashers until the child has reached the edge of whichever side of the road is his/her destination, the flashers should not be turned off until students entering the bus have taken a seat. When discipline problems arise, bus drivers must promptly inform the appropriate school officials; under no circumstances should bus drivers suspend or otherwise remove troublesome students from the bus unless authorized by transportation guidelines to do so.¹⁵¹

D. School Defenses in Transportation Litigation

1. Satisfaction of Notice Requirements

Since bus drivers and school districts face considerable potential for liability regarding transportation decisions, they should be able to avail themselves of whatever defenses can normally be interposed in lawsuits involving public education. The most frequently interposed defenses involving claims against a public defendant concern satisfaction of appropriate notice requirements and governmental immunity.

The concept of notice refers to knowledge by the public entity that a party has been injured or otherwise damaged in some manner involving

¹⁵⁰ *Id.* at 578.

¹⁵¹ A bus driver removing a student from a bus at other than the student's normal bus stop may be in violation of state statute, as well as any district rules. See, e.g., Fla. Stat. Ann. § 232.28(3) (West 1989) ("The bus driver shall ... not ... put any pupil off the bus at other than the regular stop for that pupil, except by the order of the parent or the principal in charge of the school the pupil attends.")

the property or agent of the public body and that the injury/damage was the fault of the school district and/or its employees. As will be evident in the following discussion, state statutes have prescribed a certain procedure to standardize and formalize the furnishing of a claim to a public entity that an injured party has a claim regarding certain injury or damage. However, knowledge of such a claim can be acquired by agents of a public entity whether or not the injured party has complied with the statute and thus courts have become enmeshed in evaluations of individual sets of facts as to whether there has been "substantial compliance", i.e., whether the injured party through his own efforts or the efforts of his agent has supplied sufficient information to make public officials aware that a tortious wrong is alleged to have been committed. Because the statutory window to furnish notice of a claim for injury or damage tends to be fairly short, and because the effect of failing to furnish notice is loss of any claim against the public entity, courts have frequently been somewhat solicitous toward injured claimants.

At least three critical legal questions arise when the issue of timely notice becomes important: whether the notice of claim was served within the requisite number of days;¹⁵² whether the notice was served to the right person;¹⁵³ and whether failure to give notice within the required number of days or serve the right person is excusable under the circumstances through substantial compliance.¹⁵⁴ Virtually all states specify by statute the number of days a claimant has to file notice of a claim. The purposes for timely notice of claims have generally been held to be:

to further legitimate state interests by fostering prompt investigation while the evidence is still fresh; the opportunity to repair any dangerous condition; quick

¹⁵² E.g., see Okla. Stat. Ann. tit. 51 § 156B (West 1988) (filed within 90 days after the loss occurs); Cal. Gov't Code § 911.2 (West 1978) (filed not later than the 100th day after the accrual of the cause of action).

¹⁵³ Okla. Stat. Ann. tit. § 156(D) (West 1988) (filed with the clerk of the governing body of the political subdivision); Cal. Gov't Code § 945.4 (West 1978) ("[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented ... until a written claim therefor has been presented to the public entity")

¹⁵⁴ As is indicated in the discussion, *infra* at notes "155-162" and accompanying text, courts are willing to apply a "substantial compliance" standard in determining whether the defendant public entity had actual knowledge of the claim, even if the claim was not provided in the form required by statute. For example, language in Okla. Stat. Ann. tit. 51 § 156B (West 1988) that a claim not made within 90 days is "forever barred" has a finality that the courts have tended to honor as much by the exception as by the rule.

and amicable settlement of meritorious claims; and preparation for fiscal planning to meet any possible liabilities.¹⁵⁵

In *Graves v. Rose*¹⁵⁶ a 23 month delay in the school district receiving actual notice of an injury and claim "prejudiced the School District's interest in prompt investigation while the evidence was fresh."¹⁵⁷ However, it is difficult to discern what constitutes prejudice to a school district; presumably any late claim would affect the purposes for timely notice of claims. Where the statutory filing time frame has been exceeded courts become immersed in weighing the plaintiff's reasons for non-timely filing against the school district's allegations of prejudice. In *Duesterhaus v. City of Edmond*,¹⁵⁸ even though written notice of a claim was required by the statute, verbal notice to the political subdivision's attorney was considered to be substantial compliance when the city could show no prejudice. Likewise, in *Ireland v. Hinkle*,¹⁵⁹ a claim filed two days beyond the statutory limit was permitted where "the school district and its insurer had prompt notice of the accident and an opportunity to investigate" and the school district could prove no prejudice.¹⁶⁰ On the other hand, an accident report sent to the appropriate state agency was held not to establish actual notice to a local school district or its driver and a subsequent lawsuit against the school district and its driver was dismissed.¹⁶¹ But a written notice of claim sent to the clerk of the wrong political subdivision (city rather than school district) was held not to be prejudicial where attorney for claimant had also previously notified in writing the school district's insurer.¹⁶²

As just suggested, where timely notice has not been served on any party who could act in a reasonable manner to protect its valid interests,

¹⁵⁵ *Reirdon v. Wilburton Bd. of Educ.*, 611 P.2d 239, 241 (Okla. 1980) (no prejudice to defendant where letter concerning claim sent approximately within statutory period and pending litigation had been discussed in board meeting); *Duesterhaus v. City of Edmond*, 634 P.2d 720 (Okla. 1981) (actual notice within statutory period to representative of municipality adequate); *Johns v. Wynnewood Sch. Bd. of Educ.*, 656 P.2d 248 (Okla. 1982) (filing requirement in state tort claims act takes precedence over statute tolling tort claims for minors until one year after 18th birthday); *Ross v. City of Shawnee*, 683 P.2d 535 (Okla. 1984) (notice of accident not substitute for notice of tort claim); *Syseo Intermediate Food Serv. v. City of Twin Falls*, 705 P.2d 548 (Idaho Ct. App. 1985) (inadvertent filing of claim by inexperienced clerk rather than sending to insurer not prejudicial since insurer already had actual notice.)

¹⁵⁶ 663 P.2d 733 (Okla. 1983).

¹⁵⁷ *Id.* at 735.

¹⁵⁸ 634 P.2d 720 (Okla. 1981).

¹⁵⁹ 577 N.Y.S.2d 541 (App. Div. 1991).

¹⁶⁰ *Id.* at 542.

¹⁶¹ *Graves*, *supra* note 156.

¹⁶² *Conway v. Ohio Casualty Ins. Co.*, 669 P.2d 766 (Okla. 1983).

then courts tend to look at plaintiff's excuses for non-filing. *Ebersol v. Cowan*¹⁶³ presents an interesting set of facts pertaining to just such a problem. In *Ebersol*, a bus driver who had been bitten on her hand by one of her mentally retarded teenage passengers failed to file a claim within the statutory 100-day limit. Her injury resulted in at least five visits to a hospital over a three-month period of time culminating in surgery and ongoing medical treatment for tissue degeneration. During the four months following the injury the bus driver contacted nine different attorneys who either informed her she had no cause of action or expressed no interest in her claim. On advice of a tenth attorney she finally presented her claim 127 days after the accrual of her cause of action. Her claim was summarily denied by the school district and the denial was affirmed by the trial court. In reversing the trial court the California Supreme Court distinguished between this case where plaintiff "acted diligently to retain legal counsel within the 100-day limitation period"¹⁶⁴ and other "cases where the conduct of plaintiff's retained counsel was clearly unreasonable or inexcusably dilatory."¹⁶⁵ In addition the court noted that plaintiff "sought to retain legal counsel to pursue her claim rather than undertake an independent investigation of the facts and the law of her own case."¹⁶⁶ In other words, unless a school district can prove prejudice for a non-timely filing, courts may be willing to permit a claim to ripen into a possible legal course of action where a plaintiff who sought to work through the adversarial system would be denied any relief at all if the late claim were not permitted.¹⁶⁷ However, as suggested in *Ebersol*, a potential claimant whose delay in filing a claim is due to her own attempts at investigation may find the late claim denied altogether.

The reason for making a claim to a public entity before any lawsuit can be commenced is to provide an opportunity for settlement without unduly depleting public resources. If a claimant's entire claim is paid by the public entity or if the claimant accepts less than the claim as full settlement he/she is generally precluded from filing a lawsuit.¹⁶⁸

¹⁶³ 673 P.2d 271 (Cal. 1983).

¹⁶⁴ *Id.* at 277.

¹⁶⁵ *Id.* See also nn. 9-11 at 276-277.

¹⁶⁶ *Id.* at 279.

¹⁶⁷ Liability of the school district in *Ebersol* for the act of a student on the bus is somewhat speculative, which probably accounts for the number of attorneys who indicated no interest in the case. Regarding the liability of a person in a supervisory position for the acts of one being supervised, California law is controlled by *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) which restricts liability to certain professions.

¹⁶⁸ *E.g.*, see Cal. Gov't Code § 946 (1980).

But even if timely notice has been furnished to a public entity (such as a school district), and no satisfactory settlement has been made with the claimant, most states require by statute that a lawsuit be filed within a specified period of time after denial of the claim by the public entity against which the claimant has the claim, or the claim is barred.¹⁶⁹ In other words, an injured party who claims that his/her injury resulted from the conduct of a public entity has two opportunities for losing, once at the notice of claim stage and then at the filing of lawsuit stage. In *Lucas v. Independent School District No. 35*,¹⁷⁰ a claimant injured in a collision with a school bus had six months after the school district was deemed by statute to have denied her claim to file her lawsuit.¹⁷¹ Despite claimant's allegations that she was incapacitated for medical reasons for part of the six months statute of limitations, the *Lucas* court refused to toll the statute of limitations for the period of the alleged incapacitation. *Lucas* seems to suggest that courts may be more inflexible regarding late filings of lawsuits than for late notice of claims.

2. Sovereign or Governmental Immunity

When public entities are defendants the most frequently interposed defense is sovereign or governmental immunity. Governmental immunity prohibits tort actions against government agencies, but the modern trend in the United States is for states to either abrogate governmental immunity altogether or to design statutory exceptions (or waivers) to tort immunity.¹⁷² Generally, the immunity exception applies only to the extent that the school district is indemnified by the insurer for the negligence or tort.¹⁷³ However, a plaintiff must make a specific claim under one or more of the statutory exceptions and failure to do so will result in the presumption that governmental immunity applies.¹⁷⁴

A common exception to governmental immunity concerns the waiver of immunity to the extent of the dollar value of liability insurance

¹⁶⁹ E.g., see Okla. Stat. Ann. tit. 51 § 156(C) (West 1988) (claimant must file complaint in lawsuit within 6 months after claim has been denied, or deemed to have been denied, by the political subdivision against which the claim has been made).

¹⁷⁰ 674 P.2d 1131 (Okla. 1983).

¹⁷¹ Under Okla. Stat. Ann. tit. 51 § 157 (West 1988), a claim is considered to have been denied by a political subdivision (school district) if not approved by the subdivision within 90 days.

¹⁷² See discussion in K. Alexander and M. David Alexander, AMERICAN SCHOOL LAW 484-86 (1985).

¹⁷³ E.g., see N.C. Gen. Stat. § 115C-42 (1991); Okla. Stat. Ann. tit. 70 § 9-106 (West 1989).

¹⁷⁴ Mount Pleasant Indep. Sch. Dist. v. Estate of Lindberg, 766 S.W.2d 208 (Tex. 1989).

purchased.¹⁷⁵ The insurance waiver may include both no-fault and damages provisions, although a plaintiff may not be able to recover under both.¹⁷⁶ The mere existence of insurance coverage does not affect governmental immunity unless plaintiffs can "plead either that the defendant's activity comes within one of the statutory exceptions to immunity or that the activity did not constitute the exercise or discharge of a governmental function."¹⁷⁷

Frequently, the insurance exception can be combined with waiver claims under other exceptions. In *Smith v. McDowell County Board of Education*,¹⁷⁸ an accident involving the school district's driver education car subjected the school board to tort liability to the extent of the district's insurance coverage because the car was not a "school transportation vehicle,"¹⁷⁹ within one of the immunity statute's provisions but, on the other hand, in *King v. Little Rock School District*,¹⁸⁰ a school district was immune from tort liability where it had leased two buses for a one-day field trip because under state statute the district was required to carry liability insurance only on its own motor vehicles.¹⁸¹

Another exception to governmental immunity involves the operation of vehicles owned by a governmental entity. Generally, school districts are liable for injuries resulting from operation or use of their own motor vehicles. Despite creative efforts by plaintiffs in arguing that certain kinds of conduct amount to vehicle operation, courts have found the following fact situations do not come within statutory exceptions to governmental immunity pertaining to vehicle operation: failure to advise a student how to walk safely along a highway;¹⁸² failure to place bus

¹⁷⁵ E.g., see South Carolina Code § 59-67-710 (Law Co-op 1990) (\$15,000); Okla. Stat. Ann. tit. § 153 (1988) (\$50,000). See also *Richardson v. Rankin County Sch. Dist.*, 540 So. 2d 5 (Miss. 1989) (despite judgment against school district of \$550,000 plaintiff could only recover \$10,000, the maximum of liability coverage under the immunity statute); *Brown v. Egan Consol. Sch. Dist.*, 449 S.W.2d 259 (S.D. 1989) (summary judgment for school district on basis of governmental immunity not appropriate where immunity had been waived to extent of insurance coverage).

¹⁷⁶ See *Toney v. South Carolina Dep't of Educ.*, 327 S.E.2d 322 (S.C. 1985) (recovery under no-fault portion of Wrongful Death Act for death of child precluded recovery under damages portion because, had the child survived, he would not have been able to recover under both).

¹⁷⁷ *Van Dinh v. Forest Hills Pub. Schs.*, 34 N.W.2d 510, 513 (Mich. Ct. App. 1983). See also *Bartley v. Special Sch. Dist. of St. Louis County*, 649 S.W.2d 864 (Mo. 1983) (purchase of liability insurance did not automatically waive governmental immunity; claim had first to come within an immunity exception).

¹⁷⁸ 316 S.E.2d 108 (N.C. Ct. App. 1984).

¹⁷⁹ N.C. Gen. Stat. § 143-291 *et seq.* (1991) provides for an Industrial Commission to hear tort claims involving "school transportation vehicles" rather than using the judicial system.

¹⁸⁰ 782 S.W.2d 574 (Ark. 1990).

¹⁸¹ See Ark. Stat. Ann. § 12-2903 (1979).

¹⁸² *Van Dinh*, *supra* note 177.

warning signs;¹⁸³ and the act of a bus driver in holding a student while another student struck him.¹⁸⁴

Another exception to governmental immunity can involve the responsibility for certain public entities to maintain appropriate traffic controls. In *Aberant v. Wilkes-Barre Area School District*,¹⁸⁵ parents suing on behalf of their child killed after disembarking from a school bus unsuccessfully sought to argue that the flashing lights on a school bus were "traffic controls ... under the care, custody or control of the local agency."¹⁸⁶ an exception to governmental immunity in Pennsylvania. In rejecting the parents' claims, the court observed that "[a] school bus is a motor vehicle to which the lights are affixed. The lights are a part of the vehicle and not a traffic control light."¹⁸⁷

Where state statutes create liability for non-discretionary or ministerial governmental functions, the question for courts is whether the decision involves planning (usually protected by governmental immunity) or operations (not protected). Unfortunately, the distinction between the two functions frequently becomes little more than labeling.¹⁸⁸ For example, school district planning of bus stops might be considered to be a planning function, and therefore be immune from liability, but the improper stopping of a bus along a highway could be an operational function, and immunity would be waived.¹⁸⁹ Judicial distinctions appear to reflect fine gradations among various kinds of government acts and a consistent policy concerning operational or planning functions is difficult to discern. The result has been decisions that appear to conflict within the same jurisdiction,¹⁹⁰ as well as from one jurisdiction to another.¹⁹¹ The lesson for plaintiff and school district alike is that interpretation of government immunity may involve a very fluid approach.

¹⁸³ *Harrison v. Escambia County Sch. Bd.*, 419 So. 2d 640 (Fla. Dist. Ct. App. 1982); *contra* *Brooks v. Woods*, 640 P.2d 1000 (Okla. 1982).

¹⁸⁴ *Johnson v. Carthell*, 631 S.W.2d 923 (Mo. Ct. App. 1982).

¹⁸⁵ 492 A.2d 1186 (Pa. Commw. Ct. 1985).

¹⁸⁶ Pa. Cons. Stat. Ann. tit. 42 § 8541 (Purdon 1982).

¹⁸⁷ *Aberant*, 492 A.2d at 1188.

¹⁸⁸ See *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968).

¹⁸⁹ See *Chee Owens v. Leavitts Freight Serv.*, 745 P.2d 1106 (N.M. Ct. App. 1987). Similarly, failure of a bus driver to properly activate flashers to indicate a bus is stopping to discharge children can be an "act or omission arising from the operation or use of a motor vehicle" and therefore constitute a waiver of governmental immunity. *Hitchcock v. Garvin*, 738 S.W.2d 34 (Tex. Ct. App. 1987).

¹⁹⁰ See cases cited in *Harrison*, *supra* note 183 at 650.

¹⁹¹ Some jurisdictions recognize that the government's planning function does not protect faults in designs that are so obvious as to be inherently dangerous. See *Dodds v. West Liberty*, 281 N.W. 476 (Iowa 1938); *Gould v. Topeka*, 4 P. 822 (Kan. 1884); *Donnelly v. Ives*, 268 A.2d 406 (Conn. 1970); *Paul v. Faricy*, 37 N.W.2d 427 (Minn. 1949).

Of course, the fact that a school district is immune from liability does not mean that the bus driver is also immune.¹⁹² In *Plummer v. Dace*,¹⁹³ a cause of action against a school bus driver for allegedly permitting a six-year old child to alight at an unsafe place where he was struck by a car was upheld, even though the cause of action against the school district was dismissed under governmental immunity. The *Plummer* court reasoned that the complaint against the school district alleging negligence in properly training its bus drivers did not come within the bus operation exception to governmental immunity.

3. Contributory Negligence

Even where the plaintiffs have given appropriate notice and where their claim is not barred by governmental immunity, recovery on their claim may be barred in whole or in part by the plaintiffs' own contributory negligence (or the contributory negligence of the party on whose behalf the plaintiffs are suing). In comparative negligence states, appeals courts tend to carefully scrutinize trial court opinions to evaluate such matters as whether a high percentage of contributory negligence should have been assigned to a child,¹⁹⁴ whether a low percentage of fault assigned to vehicles other than the school bus was correct,¹⁹⁵ whether apportionment of damages among defendants was supportable by the evidence,¹⁹⁶ whether the correct legislative standard had been used in assessing liability,¹⁹⁷ or whether a parent improperly supervised the child.¹⁹⁸ In states where contributory negligence is a complete bar to recovery, courts frequently analyze closely the age of the child, as well as other factors surrounding the accident. In *Sharpe v. Quality Education, Inc.*,¹⁹⁹ an appeals court reversed a summary judgment for defendant bus company and held that the 10 or 11-year-old student "was not contributorily negligent as a matter of law."²⁰⁰ Where the facts suggest that the

¹⁹² See *Johnson v. Carthell*, *supra* notes 127-131 and accompanying text.

¹⁹³ 818 S.W.2d 317 (Mo. Ct. App. 1991).

¹⁹⁴ *Branch v. Stehr*, 461 N.Y.S.2d 346 (App.Div. 1983) (new trial awarded where jury apportioned 90 percent fault to six-year child).

¹⁹⁵ *Toeller v. Mutual Serv. Casualty Ins. Co.*, 340 N.W.2d 923 (Wis. Ct. App. 1983) (jury determination upheld finding bus company to be 93 percent negligent while truck owner that struck child was only 1 percent at fault).

¹⁹⁶ *Clomon v. Monroe City Sch. Bd.*, 572 So. 2d 571 (La. 1990) (school district 70 percent liable and motorist who struck child 30 percent liable).

¹⁹⁷ *Lockett v. Board of Educ. for Sch. Dist. No. 189*, 555 N.E.2d 1055 (Ill. App. Ct. 1990) (student 40 percent negligent in lowering window below stop-line in violation of state rules and therefore \$110,000 judgment could be reduced by \$44,000).

¹⁹⁸ *Brunson v. Dade County Sch. Bd.*, 559 So. 2d 646 (Fla. Dist. Ct. App. 1990); *Chee Owens v. Leavitts Freight Serv.*, 745 P.2d 1165 (N. Mex. Ct. App. 1987).

¹⁹⁹ 296 S.E.2d 661 (N.C. Ct. App. 1982). See *supra* note 141 and accompanying text for discussion of cases.

²⁰⁰ *Id.* at 662.

injured student had been injected into a position of danger due to defendant's mechanically faulty bus, as in *Sharpe*, most courts would probably respond likewise and be loathe to preclude any possibility of recovery at the pleadings stage. In *Arnold v. Hayslett*,²⁰¹ a Tennessee trial court (in Tennessee any contributory negligence is a complete defense) after a lengthy trial found a deceased twelve-year-old plaintiff to have been guilty of only "remote contributory negligence" that mitigated, rather than prohibited all, recovery of damages and awarded the child's next-of-kin \$40,000. On appeal, the Tennessee Supreme Court found the child's conduct to have been the proximate or causative force of his death and reversed the award of damages. In *Peters v. Independent School District Number 657, Morristown*,²⁰² a jury determination that an automobile driver in a collision with a school bus was 100% negligent was upheld, even though Minnesota is a comparative negligence state.

4. Other Defenses

The defense of sudden emergency is available in some jurisdictions, but the defense can be successfully interposed only where the facts support that the accident or injury could not have been reasonably foreseen or that the conduct of the bus driver did not contribute to the sudden emergency.²⁰³ The use of releases to abrogate or reduce liability is very often part of a defendant's case. The question of effectiveness of a release is frequently left to the trier of fact. However, in *Bellefonte Insurance Company v. Queen*,²⁰⁴ a court found as a matter of law that parents of a child, killed after being struck at a crosswalk by a school bus, were prevented from filing a lawsuit against the school board because of a "Special Release" they had executed. Despite the parents' claims that they had never intended to release the school board from all claims, the court found "unambiguous" the release of claims:

... we do hereby release acquit and discharge the School Board ... from all claims and demands, actions and causes of action, damages, costs, loss of services, expenses and compensation ... and any and all known and unknown, foreseen and unforeseen damages and the consequences thereof ²⁰⁵

²⁰¹ 655 S.W.2d 941 (Tenn. 1983).

²⁰² 477 N.W.2d 757 (Minn. Ct. App. 1991).

²⁰³ See Sparrow, Cogan, Foster, and Minton discussed in accompanying text at *supra* notes 135-140.

²⁰⁴ 431 So. 2d 1039 (Fla. Dist. Ct. App. 1983).

²⁰⁵ *Id.* at 1040.

Despite the above case, the use of releases has come under frequent judicial scrutiny and many courts have found ways of declaring such releases to be inapplicable.²⁰⁶

In one recent field trip case, a defendant school attempted to argue that the students on the field trip had been involved in a joint venture, but the court found that field trips do not fit the definition of a joint venture.²⁰⁷ In an interesting non-liability case, a new state law provided that "School crossing guards shall be the responsibility of the local law enforcement agency having immediate jurisdiction of the crossing."²⁰⁸ Although the school district had provided school crossing guards for 20 years, the district sought to avoid responsibility by claiming the local police department was the "local law enforcement agency." Although this case did not involve an injured plaintiff, the case does highlight the interest of school districts in avoiding responsibility for matters that might be areas of future litigation.

III. DUTY TO TRANSPORT STUDENTS

A. Governance Decisions

The duty to transport school children is generally established by state statutes,²⁰⁹ with state departments of education frequently maintaining general supervision over the school transportation system in the state;²¹⁰ however, the responsibility for implementing the state requirements and actually furnishing the transportation will fall upon local districts.²¹¹

²⁰⁶ See *Whittington v. Sowela Tech. Inst.*, 438 So. 2d 236 (La. Ct. App. 1983) (release invalid where injuries caused through instrumentalities in the exclusive control of the school); *Porubiansky v. Emory Univ.*, 275 S.E.2d 163 (Ga. Ct. App. 1980) (release invalid because of school's superior bargaining power). See generally, Mawdsley, (LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS) 2-8 (1989).

²⁰⁷ *Whittington*, 438 So. 2d at 246.

A joint venture is an undertaking by two or more persons to combine their property, capital, labor or skill in any combination of these elements in the conduct of a particular line of trade of general business for joint profits, thus creating the status of a partnership, although the facts do not show a formal partnership.

²⁰⁸ *School Dist. of the City of Pontiac v. Township of Bloomfield*, 339 N.W.2d 465 (Mich. 1983).

²⁰⁹ Normally, in the absence of a statute a school district owes no duty to transport pupils regardless of the distance they must travel. *Harwood v. Dysart Consol. Sch. Dist.*, 237 Iowa 133, 21 N.W.2d 334 (Iowa 1946). See Minn. Stat. Ann. § 123.39 (West Supp. 1992). ("The board may provide for the free transportation of pupils to and from school...."); see also Cal. Educ. Code § 39800 (West 1978).

²¹⁰ See e.g., Iowa Code Ann. § 285.8 (1988). State supervision is frequently tied to regulations for transportation allowances. See also, Cal. Educ. Code § 41853 (West 1978).

²¹¹ E.g., see Iowa Code Ann. § 285.10 (1988).

Where states have taken over the field of student transportation by means of comprehensive legislation mandating that students be transported to and from school, local governmental units will generally not be successful in applying local zoning ordinances to restrict carrying out that mandate.²¹² The duty to transport students to and from school is frequently stated in most expansive terms as a matter of public policy:

In districts where the state provides aids for transportation it is in the public interest to provide equality of treatment in transporting school children of the state who are required to attend elementary and secondary schools....²¹³

B. General Financial Considerations

1. Aid Formulas

Transportation of students represents a considerable financial outlay by local school districts and thus they can reasonably be expected to resist transporting students except where specifically mandated to do so and where transportation expenses will be reimbursed by the state.²¹⁴ Transportation aid entitlement formulas are designed by state legislatures and are generally complex. Transportation aid entitlement statutes typically have three aspects to them: first, there are a series of definitions which determine eligibility for aid-reimbursement;²¹⁵ second, there is a description of the formula to be used in calculating the amount of the

²¹² See *Bloomfield v. Davis County Community Sch. Dist.*, 119 N.W.2d 909 (Iowa 1963) (municipality attempted to use zoning ordinance to keep a school district from installing gasoline tanks to refuel buses); *Lauderdale County Bd. of Educ. v. Alexander*, 110 So. 2d 911 (Ala. 1957) (construction and maintenance of county bus barn was governmental function and therefore not a proprietary function subject to injunctive relief).

²¹³ E.g., see Minn. Stat. Ann. §123.76 (West Supp. 1992). See *American United, Inc. v. Independent Sch. Dist. No. 622*, 179 N.W.2d 146 (Minn. 1970). A state statute authorizing transportation of all students, public and nonpublic, has a legitimate secular purpose in promoting the safety and welfare of children.

²¹⁴ E.g., see Ill. Ann. Stat. secs. 29-2, 29-3.1, 29-3.2, 29-3.2a, 29-3.3, 29-3.4 (Smith-Hurd 1989) (school districts may charge for transportation for pupils less than 1 1/2 miles from school, for pupils to and from public and private school sponsored activities, and for pupils from other districts).

²¹⁵ E.g., see Minn. Stat. Ann. § 124.225(1) (West Supp. 1992). Included are such definitions as "transported full time equivalent pupil", "total authorized cost", and "category of transportation of service" for which reimbursement is allowable.

reimbursement;²¹⁶ and third, there may be provisions for the possibility of increased adjustments in special situations.²¹⁷ Payment of transportation aid entitlement may be based on combination of the amount of past outlays and predicted costs for the next year with final adjustment for actual authorized expenditures made during the summer following the school year in question.²¹⁸ State reimbursement may also be based on the relationship between expenses for the preceding year and the revenue limit necessary to raise that amount.²¹⁹

2. State Reimbursement

As much as school districts would find student transportation to be more financially feasible if buses could be operated at or near student capacity, schools cannot require that otherwise eligible students use the buses.²²⁰ On the other hand, school districts may be found to have operated in an arbitrary and unreasonable manner when they refuse to furnish transportation to students otherwise unable to attend school because the expense to transport those students would be higher for those students

²¹⁶ *E.g.*, see *Id.* at § 124.225 (1a,3,4) (using a regional multiple regression factor); Fla. Stat. Ann. § 236.083(2) (West Supp. 1991) (using density index); Ohio Admin. Code, ch. 3301-83-01 (1990) (amount of reimbursement depends on whether bus is board-owned, contractor-owned, or privately owned non-school bus vehicle); S.D. Codified Laws Ann. § 13-29-15 (1991) (items to be used in determining transportation costs for reimbursement include: salaries of drivers, mechanics, and supervisors; depreciation; insurance; gasoline, tires, repair parts; maintenance at private garages).

²¹⁷ *E.g.*, see Minn. Stat. Ann. § 124.225(7b) (inflation); § 124.225(7a) (softening formula); § 124.225(1)(j) (sparsity index) (Supp. 1992).

²¹⁸ See Minn. Stat. Ann. § 124.225(9) (Supp. 1992).

²¹⁹ Cal. Educ. Code § 4151 (West 1992). The reimbursement scheme increases the percentage of transportation expenses reimbursed commensurate with increase of revenue limit necessary to meet transportation expenses. Presumably, this system is an attempt to relate reimbursement to ability of school districts to provide transportation services, rather than simply reimburse on an across-the-board dollar basis. See also Ill. Stat. Ann. ch. 122 § 29-5 (Smith-Hurd 1989) (reimbursement rate dependent on Transportation Fund tax rate). Unequal educational expenditures per student, based on the widely varying property values among school districts, have been successfully challenged on state and federal constitutional equal protection grounds. See *Englewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) and *Serrano v. Priest* (Serrano III), 226 Cal. Rptr. 584 (Ct. App. 1986). For commentary on these recent developments in school finance law, see Thompson, *School Finance and the Courts: A Reanalysis of Progress*, 59 Educ. Law Rptr. 945 (1990); Sparkman and Stevens, *Texas School Finance System Unconstitutional*, 57 EDUC. LAW RPTR. 333 (1990); and Ward, *Remedies in School Gital Finance Equity Litigation*, 36 EDUC. LAW RPTR. 1 (1987).

²²⁰ *E.g.*, see Cal. Educ. Code § 35350 (West 1978) ("No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian.")

than others.²²¹ However, state statutes frequently grant local districts the option of transporting students or providing payment to parents in lieu of transportation.²²² Eligibility for school transportation is most often tied to distance from the school,²²³ and thus any financial reimbursement of parents in lieu of transportation would generally apply only to those beyond the maximum statutory walking distance. But children cannot be denied transportation if a state statute or constitution is interpreted as requiring transportation. In *Collins v. Ritchie*,²²⁴ the West Virginia Supreme Court ordered three children on a dirt road not maintained by the state to be provided bus transportation. In an earlier case, the court had interpreted the state's constitutional provision of a "thorough and

²²¹ E.g., see *Manjares v. Newton*, 49 Cal. Rptr. 805, 411 P.2d 901 (1966). But see *State v. Grand Coulee Dam Sch. Dist.*, 536 P.2d 614 (Wash. 1975) (monthly reimbursement to parents acceptable where road unsafe for buses).

²²² E.g., see Ill. Stat. Ann. § 122-12-11.5 (Smith-Hurd 1989) (boards of education can "reimburse pupils living in a portion of such district which cannot be reached by bus or train for the reasonable cost of their transportation, or for the amount necessarily expended by them for transportation in attending a high school approved by such board.") See also, Iowa Code Ann. § 285.1(b)(3) (West Supp. 1991) (where "impracticable", board can require parents to transport child for which they will be reimbursed; however, parents with more than three elementary children and one high school child will not be reimbursed). The reimbursement option exists unless transportation is mandated by other statutes or court orders, e.g., in the cases of handicapped students or students involved in a desegregation plan. See *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986) (transportation a "related service" under IDEA); *Washington v. Seattle Sch. Dist. No. 1*, 102 S. Ct. 3187 (1982) (state prohibition against busing for racial purposes held an unlawful racial classification and improper exercise of state authority over local districts).

²²³ Statutes generally specify the maximum walking distance before bus transportation will be provided. See Fla. Stat. Ann. § 236.083(1)(a) (West Supp. 1991) (2 miles); Iowa Code Ann. § 285.1(1)(a)(b) (1988) (2 miles for elementary; 3 miles for high school); Ill. Stat. Ann. ch. 122 § 29-3 (Smith-Hurd 1988) (1 1/2 miles). However, a state may also establish a maximum distance from home to school for which bus transportation would be provided. See N.J. Stat. Ann. § 18A:39-1 (West Supp. 1991) (20 miles). For an interpretation of the New Jersey statute, see *Nelson v. Board of Educ. of Borough of Glen Ridge*, 587 A.2d 1327 (N.J. Super. Ct. App. Div. 1991). The manner in which the distance is to be measured is likewise determined by statute. E.g., Iowa Code Ann. § 285.1(9) (1988) ("Distance to school or to a bus route shall in all cases be measured on the public highway only and over the most passable and safest route as determined by the area education agency board, starting in the roadway opposite the private entrance to the residence of the pupil and ending in the roadway opposite the entrance to the school grounds or designated point on bus route.") See also Ill. Stat. Ann. ch. 122 § 29-3 (Smith-Hurd 1989) ("along normally traveled roads or streets...[except where] walking constitutes a serious hazard to the safety of the pupil due to vehicular traffic.") In an interesting attorney general's opinion, the Minnesota Attorney General interpreted Minn. Stat. Ann. § 124.223 (1979) to require the distance to be measured over the most direct public road, not "as the crow flies." Op. Atty. Gen. 166a, Aug. 25, 1961. Certain classes of persons such as the handicapped for whom transportation at any distance would be required under the various federal handicapped acts may be excluded from the statutory distance requirement. See Minn. Stat. Ann. § 124.223(4) (West Supp. 1992).

²²⁴ 351 S.E.2d 416 (W. Va. 1986).

efficient system of free schools"²²⁵ as making education a "fundamental" constitutional right in the state.²²⁶

State reimbursement for transportation expenses is generally determined for students beyond a maximum walking distance from home to the nearest school according to a set statutory dollar amount or rate scheme,²²⁷ but reimbursement is possible for students within the statutory distance, such as those students designated as handicapped,²²⁸ those for whom conditions along the walking route would be hazardous,²²⁹ and those who live on hazardous roads.²³⁰ Where a parent makes a claim for reimbursement, both proof of the duty of the school district to transport and obligation by the district to reimburse belong to the parent.²³¹ Even beyond the maximum statutory walking distance, school boards may be authorized to make payments in lieu of transportation where roads are too poor for buses to travel.²³²

3. User Fees

Not all transportation expenses incurred by a school district will be reimbursable by the state, and thus districts are frequently authorized by statute to charge bus users. The United States Supreme Court has held in *Kadrmas v. Dickinson Public Schools*²³³ that a school district user fee charged to parents to transport children door-to-door does not violate the Equal Protection Clause. The basis for the equal protection challenge that some school boards in the state could invoke the user fee while others could not was rejected because education is not a fundamental right

²²⁵ W. Va. Const. Art. XII, § 1.

²²⁶ *Pauley v. Kelley*, 255 S.E.2d 859 (W. Va. 1979).

²²⁷ *E.g.*, see Iowa Code Ann. § 285.1(3) (West Supp. 1991) (reimbursement amount set at \$80 per child plus 75 percent "of the difference between \$80 and the previous school year's statewide average per pupil transportation cost, as determined by the department of public instruction."); California allows reimbursement "not to exceed the cost of actual and necessary travel" but then limits any payments to an amount determined by the school district to be its cost of transportation. Cal. Educ. Code § 39806 (West 1978).

²²⁸ *E.g.*, see Minn. Stat. Ann. § 124.223(4) (West Supp. 1992).

²²⁹ *E.g.*, see Ill. Stat. Ann. ch. 122 §29-5 (Smith-Hurd 1989).

²³⁰ *E.g.*, see Iowa Code Ann. § 285.1(b)(4) (West Supp. 1991) (reimbursement to parents living on unsatisfactory roads at rate of twenty-eight cents per mile for parents to connect with school vehicles of transportation.)

²³¹ *Riechs v. Independent Sch. Dist. of Danbury*, 257 N.W. 546 (Iowa 1935); *Bruggeman v. Independent Sch. Dist. No. 4, Union Twp., Mitchell County.*, 289 N.W. 5 (Iowa 1940); *Tow v. Dunbar Consol. Sch. Dist.*, 206 N.W. 94 (Iowa 1926). See generally, Annot., 118 A.L.R. 806 (1939).

²³² Iowa Code Ann. § 285.1(4) (West Supp. 1991); Fla. Stat. Ann. § 234.061 (West Supp. 1991).

²³³ 108 S. Ct. 2481 (1988).

under the U.S. Constitution.²³⁴ In upholding the user fee, the Court observed:

we think it is quite clear that a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it free.²³⁵

While the state statute in *Kadrmas* permitted user fees, the total fees collected "[could] not exceed an amount equal to the difference between the state transportation payment and the local district's cost for transportation during the preceding school year."²³⁶ The statute in *Kadrmas* is unusual to the extent it permits fees to be charged for normal pupil transportation. However, the authority to charge fees for transportation is not that unusual since many states permit user fees to be charged, although the amount of the fees tends to be limited by statute and is generally related to whether the transportation is reimbursable from state transportation aid.²³⁷ Just which transportation expenses are reimbursable is a matter of state statute and reimbursement may apply to field trips,²³⁸ extracurricular activities,²³⁹ any school sponsored activity,²⁴⁰ transportation of nonpublic students,²⁴¹ or transportation of migrant children or

²³⁴ The North Dakota Supreme Court had already ruled that the statute did not violate equal protection under the state constitutional provision that "The legislative assembly shall provide for a uniform system of free public schools" N.D. Const. Art. VIII, § 2. See *Kadrmas v. Dickinson Pub. Schs.*, 402 N.W.2d 897, 901 (N.D. 1987) ("transportation is not a necessary element or part of the educational process and it is not an integral part of the educational system to which the constitution refers in requiring the Legislature to provide 'a uniform system of free public schools.'")

²³⁵ *Kadrmas*, 102 S. Ct. at 2489.

²³⁶ N.D. Cent. Code § 15-34.2-06.1 (Supp. 1991).

²³⁷ See Minn. Stat. Ann. § 120.74(j) (West Supp. 1992) (fees prohibited for pupil transportation for which state transportation is authorized); Ill. Stat. Ann. ch. 122 § 29-5 (Smith-Hurd 1989) (reimbursement cannot be claimed where transportation costs claimed under another statutory provision; see *Board of Educ. of Township High Sch. Dist. No. 206, Cook and Will Counties v. Cronin*, 388 N.E.2d 72 (Ill. App. Ct. 1979) (transportation of students from extracurricular activities not reimbursable if user fees required to be charged)); Cal. Educ. Code § 39807.5 (West Supp. 1992) ("[fee] no greater than the statewide average nonsubsidized cost of providing such transportation to a pupil on a publicly owned or operated transit system"); S.D. Codified Laws Ann. § 13-30-1 (1991) (failure of school district to charge nonresident students for transportation results in denial of next state aid payment).

²³⁸ E.g., see Minn. Stat. Ann. § 120.73(1)(g), 120.74(1)(c) (West Supp. 1992).

²³⁹ *Id.* at § 120.73(j).

²⁴⁰ E.g., see Ill. Stat. Ann. ch. 122 § 29-3.1 (1989).

²⁴¹ E.g., see Minn. Stat. Ann. §§ 123.76-79, 124.223(10) (West Supp. 1992).

pre-kindergarten children.²⁴² However, where district owned buses are used to transport students in non-reimbursable situations²⁴³ or are used to transport non-student groups,²⁴⁴ fees can be charged for the use of buses utilizing a variety of bases for charges.²⁴⁵ Where school districts transport students who reside within the maximum statutory distance states differ as to whether the local district can charge a fee for such a service.²⁴⁶ Transportation of handicapped students may involve special obligations by a school district,²⁴⁷ as well as special taxing authorization.²⁴⁸

C. Funding of Transportation

1. Changes in Transportation Funding

Increasing demands for decreasing tax dollars, occasionally exacerbated by taxpayer refusal to approve millage increases, leads to hard choices by school boards as to how the available resources are to be allocated. In *Lintz v. Board of Education, Alpena Public Schools*,²⁴⁹ a local school board voted to stop providing student transportation after voters had failed to approve a separate mill proposal. Prior to reaching its decision the board had met and balanced the funding of \$800,000 for transportation against the alternatives, "increased class sizes, reduction of

²⁴² See Fla. Stat. Ann. § 234.01(c) (West Supp. 1992).

²⁴³ E.g., see transportation to and from summer school, Ill. Stat. Ann. ch. 122 § 29-3.2a (Smith-Hurd 1989); transportation of non-resident students, Iowa Code Ann. § 285.1(11) (1988).

²⁴⁴ E.g., see transportation for community recreation, Cal. Educ. Code § 39835 (West 1978); transportation of pupils to harvest during national emergency, *Id.* at § 39836; transportation for senior citizens, Ohio Rev. Code Ann. § 3327.14 (Page 1990); transportation for recreational, cultural, educational or public service programs, Ill. Stat. Ann. ch. 122 § 29-3.4 (Smith-Hurd 1989); or transportation of adults in general, Fla. Stat. Ann. § 234.211(1a) (1989).

²⁴⁵ Fla. Stat. Ann. § 234.211 (1989) ("reimbursement...in full or in part"); Cal. Educ. Code § 39801.5 (West 1978) ("all or part of the costs" for transporting adults); Ill. Stat. Ann. ch. 122 § 29-3.4 (Smith-Hurd 1989) ("Amount equal to the cost...including] a reasonable allowance for insurance premiums and depreciations of the vehicles used"); N.D. Cent. Code § 15-34.2-18 (Supp. 1991) ("rental charge and insurance coverage").

²⁴⁶ Minn. Op. Atty. Gen., 166-A-7, Nov. 29, 1969, (fees cannot be charged); Ill. Stat. Ann. ch. 122 § 29-2 (Smith-Hurd 1989) (charge can be made "not to exceed the cost thereof"); Iowa Code Ann. § 285.1(11) (1989) ("pro rata cost of transportation" of non-resident students may be collected from parents). See *Silver Lake Consol. Sch. Dist. v. Parker*, 29 N.W.2d 214 (Iowa 1948) (nonpublic student could not be transported free where he resided more than statutory walking distance from nearest public school but within that distance from his nonpublic school).

²⁴⁷ Ill. Stat. Ann. ch. 122 § 14-1.08, 14-7.01 (Smith-Hurd 1989) (responsibility to transport handicapped within school district or to schools outside district); Cal. Educ. Code § 39807.5 (West Supp. 1992) (no charge for transporting handicapped children).

²⁴⁸ Ill. Stat. Ann. ch. 122 § 34-128 (Smith-Hurd 1989) (special tax levy to transport trainable mentally handicapped students).

²⁴⁹ 325 N.W.2d 803 (Mich. Ct. App. 1982).

counseling, and cutbacks in libraries, new supplies and books."²⁵⁰ The trial court had ordered reinstatement of bus transportation, holding that this obligation was mandated by a state constitutional provision: "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."²⁵¹ In reversing the trial court, the state appeals court observed that the same section of the state constitution also contained language indicating that bus transportation was less than mandatory: "The Legislature *may* provide for the transportation of students to and from any school."²⁵² In concluding that the provision of student transportation was permissive and not mandatory under the state constitution, the court held "that the Board of Education did not abuse its discretion in deciding to stop providing transportation to and from school, in light of the shortage of funding."²⁵³ However, the appeals court concluded its opinion with a troubled reflection on the tensions between failure of legislatures to adequately fund education and demand for the judiciary to protect the rights of students:

The voters of Alpena and Presque Isle have persistently refused to authorize sufficient funding to support both an adequate education system and a school transportation system. We are disturbed by the prospect that the burden of this policy may fall disproportionately upon a minority of rural families who are politically powerless to alter the situation. Be that as it may, it is the responsibility of the Legislature—and not the judiciary—to remedy any such inequity.²⁵⁴

The financial balancing process noted above in *Lintz* can produce the opposite result, taking funds from some other fund to provide for transportation. In *Ryan v. City of Philadelphia*,²⁵⁵ taxpayer-plaintiffs sought to invalidate a \$3 million transfer of city general funds to fund school busing on the ground that, under the state's Home Rule Act, municipalities were prohibited from regulating education.²⁵⁶ In upholding the transfer,

²⁵⁰ *Id.* at 805.

²⁵¹ Mich. Const. art. 8, § 2.

²⁵² *Id.* (emphasis added).

²⁵³ *Lintz*, 325 N.W.2d at 806.

²⁵⁴ *Id.*

²⁵⁵ 570 F. Supp. 698 (W.D. Pa. 1983).

²⁵⁶ See Pa. Stat. Ann. tit. 53, § 13219(a)(2) (Supp. 1991).

the federal district court observed that providing busing to protect citizens' health, safety, and welfare was clearly a permissible municipal function.²⁵⁷

2. Transportation and Constitutional Right to Education

Even with transportation reimbursement, local school districts may still want to reduce or eliminate student busing. Whether or not districts can do so will depend on statutory and constitutional provisions.

Attempts by school boards to cut back or eliminate bus transportation have met with challenges under state or federal equal protection clauses. Generally, this challenge has been unsuccessful. In *Sutton v. Cadillac Area Public Schools*,²⁵⁸ the Michigan Court of Appeals rejected a challenge by parents that failure of a school district to provide bus transportation violated equal protection of the laws under both the state and federal constitutions. Because education is not a fundamental constitutional right under either the federal²⁵⁹ or Michigan²⁶⁰ constitutions, the court rejected application of a strict-scrutiny-compelling state interest test and observed that: "Allocation of a school district's limited funds to education-related matters other than transportation is not irrational. Equal protection does not require that government choose between attacking every aspect of a problem or not attacking the problem at all."²⁶¹ In *Shaffer v. Board of School Directors*²⁶² a federal district court likewise determined that a school district's decision to provide one-way instead of two-way transportation for children attending kindergarten did not violate the due process or equal protection rights of indigent parents. However, the court did order two-way busing because, under a state statute requiring school districts to provide safe and effective transportation, student needs could not be met with only one-way busing.

In those states that have interpreted their constitutions to create a fundamental constitutional right for education, the effects on the provision of transportation can be considerable. The West Virginia Supreme

²⁵⁷ See also *Reed v. Hillsboro Pub. Sch. Dist. No. 9*, 477 N.W.2d 237 (N.D. 1991) (school district transfer of funds from special reserve fund to building fund for use of building construction and maintenance was totally discretionary and therefore school district could not be subject to mandamus to transfer back the funds).

²⁵⁸ 323 N.W.2d 582 (Mich. Ct. App. 1982).

²⁵⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1982).

²⁶⁰ See *East Jackson Pub. Schs. v. State of Mich.*, 348 N.W.2d 303 (Mich. Ct. App. 1985) (education not fundamental right under Michigan Constitution). *Contra Lutz*, *supra* note 249 at 805 where the same appeals court had earlier declared that "under the Michigan Constitution, the citizens of this state have a fundamental right to free public education."

²⁶¹ *Sutton*, 323 N.W.2d at 584.

²⁶² 570 F. Supp. 698 (W.D. Pa. 1983).

Court has interpreted its constitutional provision for "a thorough and efficient system of free schools"²⁶³ to create a constitutional right to education.²⁶⁴ In *Potter v. Miller*²⁶⁵ where a local school board had refused to provide bus service because of impassable roads, the West Virginia fashioned an expansive remedy, which included in part an obligation to: "(1) Devise alternative bus routing to increase access to transportation for petitioner's children during inclement weather; (2) provide shelters for the affected school children in conjunction with the alternative bus routes...."²⁶⁶ More recently, in *Collins v. Ritchie*,²⁶⁷ the same court has fashioned an even more extraordinary remedy for children on a poorly maintained road that was under water during inclement weather and, when the children living on the road were able to travel to school, they had to do so by crossing a river on an abandoned swinging bridge, crossing railroad tracks where train cars were frequently parked, and walking along a busy highway. In ordering not only the school district to provide bus transportation over the road to the children's homes, but also the state Department of Highways to increase maintenance so a bus could travel over the road, the West Virginia Supreme Court observed:

The fundamental, constitutional right to an education is no more important to children who live on a major public thoroughfare than it is to those on Sand Creek Hollow Road [the road on which the children in this case lived]. All children have the same right to a 'thorough and efficient' education and to deny them that right because they live on an inconvenient road would be to deny them the equal protection of the laws.²⁶⁸

Not surprisingly, the West Virginia Supreme Court has also directed schools to purchase smaller or newer school buses to traverse difficult roads, or provide alternative means of transportation for children who would otherwise have no way to travel to school.²⁶⁹

²⁶³ W. Va. Const. art. 12 § 1.

²⁶⁴ *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984).

²⁶⁵ 287 S.E.2d 163 (W. Va. 1981).

²⁶⁶ *Id.* at 165. The transportation problem in this case was exacerbated because the children's absences occasioned by the bad condition of the roads were considered under state law to be unexcused.

²⁶⁷ 351 S.E.2d 416 (W. Va. 1986).

²⁶⁸ *Id.* at 418.

²⁶⁹ *Sigmon v. Board of Educ. for County of Roane*, 324 S.E.2d 352 (W. Va. 1984); *Shrewsbury v. Board of Educ., County of Wyoming*, 265 S.E.2d 767 (W. Va. 1980). In *Collins* the importance of home-to-school transportation was emphasized because the parents had no vehicles to transport the children, and, in one case, no driver's license. 351 S.E.2d at 417.

3. Statutory Options and Limitations

Frequently, the decision whether or not to provide bus transportation will depend on state statute interpretations. In *Hartley v. Berlin Local School District*,²⁷⁰ a local school board in Ohio had provided payments in lieu of transportation to a number of parents whose children lived along a public school bus route but who attended a nonpublic school in an adjacent district. However, state statute authorized such payments in lieu of actually providing transportation only where the state board of education had confirmed upon petition from the local board that transportation was unnecessary or unreasonable.²⁷¹ Since the local board in this case had not received prior confirmation from the state board, the local board was required to comply with the statute and provide transportation. In the subsequent case of *Pushay v. Walter*,²⁷² the Ohio Supreme Court had occasion to determine that a local school board could not avoid its statutory obligation to provide transportation to nonpublic students by attempting to prove through deceptively derived evidence that providing such transportation would be unreasonable. In a larger context, school districts, as suggested by the Ohio cases above, may prefer to make payments to parents in lieu of having to provide transportation. In *State ex rel. Stephan v. Board of Education*,²⁷³ a local school board calculated the cost of providing bus transportation to be \$350,000 to \$500,000 and voted to terminate bus service. Two thirds of parents who had responded to a questionnaire had favored mileage reimbursement over busing; however, the state's attorney general responded by issuing a formal opinion advising the board that it had a formal duty to provide bus transportation.²⁷⁴ The state supreme court resolved the conflict by determining that the state statute left the decision solely in the discretion of the local board whether to operate bus routes, to enter into mileage reimbursement contracts, or to do both.

Attempting to determine whether a school district has the responsibility to fund transportation may be very difficult where a statute is relatively new and no legal interpretation is available. The difficulty is intensified because a school district may be at risk to pay damages where transportation was not provided as determined to be required by statute.

²⁷⁰ 433 N.E.2d 171 (Ohio 1982).

²⁷¹ Ohio Rev. Code Ann. 3327.01 (Page 1990).

²⁷² 481 N.E.2d 575 (Ohio 1985).

²⁷³ 647 P.2d 329 (Kan. 1982).

²⁷⁴ See Kan. Stat. Ann. § 72-8302 (Supp. 1991). The statute has an apparent conflict: "board of education...may provide or furnish transportation for pupils....Every school district shall provide or furnish transportation for every pupil...." (emphasis added).

In *Hurry v. Jones*,²⁷⁵ a federal appeals court, in addition to deciding that transportation is a "related service" under the Education for All Handicapped Children Act (EHA) now, Individuals with Disabilities Education Act (IDEA)²⁷⁶ had also to decide the measure of damages for violation of the statute. In *Hurry*, parents for 3 1/2 years had attempted to transport to school their child, handicapped with cerebral palsy, in their own van because the school district had refused to transport the child. Eventually the district determined without notice of placement or opportunity of hearing that the appropriate placement for the child was home instruction. Finally, because the parents could no longer maneuver their child in and out of the van and because the child's physical condition had deteriorated significantly while having to wait for long periods of time in the van, the parents sought damages against the school district on a number of theories: reimbursement for transportation services provided by parents, compensatory damages for the child's loss of enjoyment of life, money damages for violating the child's rights under section 504 of the Rehabilitation Act of 1973,²⁷⁷ damages under section 1983 of the Civil Rights Act,²⁷⁸ and recovery of attorney fees. The federal district court awarded damages on all theories, except section 1983,²⁷⁹ in the sum of almost \$20,000, plus attorney fees and costs.²⁸⁰ In reversing most of the damage award, the appeals court did permit \$1150 to the parents for out-of-pocket expenses for driving the child to school and \$4600 for their driving time, all under IDEA. But the appeals court overturned the damage award for physical and emotional hardship under section 504, as well as attorney fees under that section, because plaintiff's exclusive remedy was under EHA.

The conclusion of this section would seem to be that if education is required, whether by constitutional or statutory interpretation, school districts can be compelled to fund that transportation. The possibility exists that damages might be recoverable if school district action is particularly egregious.

For the special category of students who are handicapped and for whom transportation may represent one of the services required to be furnished, the extent to which the cost of the options available should be

²⁷⁵ 734 F.2d 879 (1st Cir. 1984).

²⁷⁶ 20 U.S.C. § 1401(17).

²⁷⁷ 29 U.S.C. § 794.

²⁷⁸ 42 U.S.C. § 1983.

²⁷⁹ Section 1983 cannot be used to enforce rights adequately protected under the statute at issue. See *Carey v. Piphus*, 435 U.S. 247 (1978).

²⁸⁰ 560 F. Supp. 500 (D.R.I. 1983).

a significant factor in determining the educational program to be selected is a difficult policy question.²⁸¹

D. Transportation of Nonpublic School Students

1. Constitutional Concerns

Since the United States Supreme Court upheld under the establishment clause of the first amendment the right of a state to provide transportation or reimbursement in lieu of transportation to nonpublic students,²⁸² such transportation has survived a number of challenges under state constitutional provisions prohibiting aid or gifts of money for sectarian purposes.²⁸³ State courts have consistently interpreted their own constitutions very narrowly to mean that transportation services go to the students and "any benefit that may inure to the nonprofit private institution is merely incidental."²⁸⁴

Treating public and nonpublic students differently can also present constitutional questions. In *McCarthy v. Hornbeck*,²⁸⁵ parents of nonpublic children living in one of thirteen Maryland counties not providing for transportation of nonpublic students challenged on free exercise and equal protection grounds a state statute that permitted only eleven of twenty-four counties to extend to nonpublic students the same transportation arrangements as for public school students. The parents claimed that not providing nonpublic student transportation in the thirteen counties violated their free exercise of religion to select nonpublic schools for their children and violated equal protection because there was no rational basis for the statutory distinction. The federal district court found no free exercise problem because Maryland's transportation system "places at most an indirect economic burden on plaintiffs' right to freely exercise their religion,"²⁸⁶ and no equal protection violation because Maryland's transportation arrangement "is rationally related to the State's valid goal

²⁸¹ For an excellent analysis of the policy concerns, see Collins and Zirkel, *To What Extent, If Any, May Cost Be A Factor In Special Education Cases?*, 71 EDUC. L. REPR. 11 (1992).

²⁸² *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

²⁸³ *Board of Educ. Sch. Dist. No. 142, Cook County v. Bakalis*, 299 N.E.2d 737 (Ill. App. Ct. 1973) ("anything in aid of any church or sectarian purpose"); Ill. Const. art. 10 § 3; *Broker v. Baker*, 73 Cal. App. 2d 653 (1946) ("to or in aid of any religious sect".... "for the support of any sectarian or denominational school"); Cal. Const. art. 4 § 30 and art. 9 § 8; *Gurney v. Ferguson*, 122 P.2d 1002 (Okla. 1942) ("directly or indirectly, for the use, benefit or support of a sect, church..."); Okla. Const. art. § 5; *Matthews v. Quinton*, 362 P.2d 932 (Alas. 1961) ("for the direct benefit of any religious or other private educational institution"); Alaska Const. art. 7 § 1.

²⁸⁴ *Nebraska v. School Dist. of City of Lincoln*, 320 N.W.2d 472, 476 (Neb. 1982). See also, *Honohan v. Holt*, 244 N.E.2d 537 (Ohio Ct. Comm. Pleas 1968).

²⁸⁵ 590 F. Supp. 936 (D. Md. 1984).

²⁸⁶ *Id.* at 945.

of conserving limited financial resources."²⁸⁷ In other words, a state "is [not] constitutionally required to subsidize the transportation of [nonpublic] children to [their] schools."²⁸⁸ In *Novak v. Revere Local School District*,²⁸⁹ parents of nonpublic students challenged on equal protection grounds an Ohio statute²⁹⁰ permitting reimbursement only where transportation travel time was thirty minutes or less. Applying a rational basis standard²⁹¹ the court found the statute had a rational basis for creating a classification for transportation or reimbursement based on distance or travel time.

As in *McCarthy* above where the failure to provide nonpublic student bus service may be challenged on free exercise grounds, a statute providing for transportation of nonpublic students also can be challenged on establishment clause grounds. In *Members of the Jamestown School Committee v. Schmidt*²⁹² a federal appeals court had to decide the constitutionality of a state statute which provided for transportation of nonpublic students beyond school district limits. The state statute stated that a public school district in which school age children resided must provide transportation to and from the children's schools (public and nonpublic alike) only if the children "live at such distances from the schools which they attend as to make it impractical or hazardous to require [them] to walk to school."²⁹³ The statute was challenged under the establishment clause because nonpublic students were frequently being bused to their schools in neighboring public school districts. By allowing interdistrict transportation for nonpublic students the district court found the law violative of the establishment clause because the law "provides sectarian school children with 'greater options at greater public expense than their public school counterparts' and administrative contacts to coordinate the program together with the risk of political division along religious lines created 'an excessive entanglement of church and state.'"²⁹⁴ In reversing the district court, the court of appeals concluded that:

So long as public and sectarian children are bused to their own schools, and the same standard of remoteness

²⁸⁷ *Id.* at 947.

²⁸⁸ *Id.* at 941.

²⁸⁹ 583 N.E.2d 1358 (Ohio Ct. App. 1989).

²⁹⁰ Ohio Rev. Code Ann. § 3327.1 (Page 1990). The statute was challenged under the state equal protection clause, Ohio Const. art. 1, § 2.

²⁹¹ *Novak*, 583 N.E.2d at 1361 (Ohio in interpreting its own equal protection clause follows *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), in finding that there is no fundamental constitutional right to education).

²⁹² 699 F.2d 1 (1st Cir. 1983).

²⁹³ R.I. Gen. Laws § 16-21.1-1 (1988).

²⁹⁴ *Jamestown*, 699 F.2d at 3, (quoting *Members of the Jamestown Sch. Comm. v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981)).

applies to public and sectarian students alike, the fact that public students are ordinarily ineligible for busing to schools beyond district lines does not render [the statute] invalid under the Establishment Clause or the Equal Protection Clause.²⁹⁵

2. Statutory Concerns

However, the absence of a constitutional prohibition regarding provision of public transportation for nonpublic students does not mean that such provision may not have been limited by statute. For example, Ohio, in providing for transportation of nonpublic students, has enacted a provision that: "No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members or employees, practices discrimination against any person on the grounds of race, color, religion, or national origin."²⁹⁶ Whatever that provision may mean in terms of limiting the furnishing of transportation, the same Ohio statute declares that

"the board of education shall provide transportation for [nonpublic] pupils to and from [a nonpublic] school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable."

In *Haig v. Ohio State Board of Education*²⁹⁷ the Ohio Supreme Court appeared to uphold a school board refusal for 1986-87 to provide trans-

²⁹⁵ *Id.* at 8, (emphasis in original). See also, *Cumberland Sch. Comm. v. Harnois*, 499 A.2d 752 (R.I. 1985) where court upheld transportation of nonpublic students to nonpublic school in same region, even though in a different town. In addition, see *Snyder v. Charlotte Pub. Sch. Comm.*, 365 N.W.2d 151 (Mich. 1984) where constitutionality of state statute upheld requiring that nonessential elective courses in public schools be offered on time-sharing basis with nonpublic students. But see *Americans United for Separation of Church and State v. Benton*, 413 F. Supp. 955 (D.D.C. 1976) where transporting students to a nonpublic nonresident district school was held to violate the establishment clause. See also, *Monroe-Woodbury Sch. Unit of Orange County v. Local 836 of Civil Serv. Employees Ass'n Local 1000, AFSCME, AFL-CIO*, 659 F. Supp. 1450 (S.D.N.Y. 1985) (school assignment of only male bus drivers to area where religious sect believed male children could ride only in buses driven by males held to violate establishment clause and title VII).

²⁹⁶ Ohio Rev. Code Ann. § 3327.01 (Page 1990). State department of education regulations would appear to make ineligible for public transportation students at any nonpublic institution that discriminates in employment or student admissions on the basis of religious qualifications. Cf. Ohio Admin. Code, ch. 3301-35-02(1) with 3301-35-08. However, in *Honohan v. Holt*, 244 N.E.2d 537 (Ohio Ct. Comm. Pleas 1968) the provision of transportation to religious schools was found not to violate the Ohio Constitution, Art. I, § 7, which provides that "no person shall be compelled to...support any place of worship...."

²⁹⁷ 584 N.E.2d 704 (Ohio 1992).

portation for students residing on Kelley's Island in Lake Eire to a nonpublic school on the mainland where the cost for providing air transportation for six students for 1984-85 had exceeded \$20,000 and the anticipated cost for 1986-87 for only two students was anticipated to be \$13,500.

A more common source of conflict concerns attempts by local districts to utilize transportation arrangements for nonpublic students other than public school buses. The conflict invariably arises because state legislatures have declared that students attending nonpublic schools within the district are to be treated the same as, or similar to, public school students.²⁹⁸ In *St. John Vianney School v. Board of Education of School District of Janesville*,²⁹⁹ five private schools located in the city of Janesville sought to compel the school board to furnish the same door-to-door bus service for nonpublic elementary students more than two miles from school as was provided public and nonpublic school students less than two miles. The state statute required that there be "reasonable uniformity in the transportation furnished such pupils whether they attend public or private schools."³⁰⁰ Under a legislative "city option" provision, the city had elected to provide free transportation to all public and private school children more than two miles from school "either through the Janesville Transit System buses or through an individual contract with the child's parent or guardian."³⁰¹ The trial court found that private school children using city buses were exposed to greater hazards than those children within the two miles who had door-to-door service and therefore was not "reasonable uniformity." In reversing the trial court, the appeals court observed that the "reasonable uniformity required is directed at the distance pupils are transported and not at the means chosen."³⁰² The appeals court went on to justify in the following manner any inequities its interpretation might create:

²⁹⁸ Iowa Code Ann. § 285.1(14) (1988) ("Resident pupils attending a nonpublic school located either within or without the school district of the pupil's residence shall be entitled to transportation on the same basis as provided for resident public school pupils under this section."); Cal. Educ. Code § 39808 (West 1978) ("Transportation upon the same terms and in the same manner and over the same routes of travel as is permitted pupils attending the district schools."); see also, Ill. Stat. Ann. ch. § 29-4 (Smith-Hurd 1989) where a public school district is authorized to operate separate bus routes for nonpublic students where such routes would be "safer, more economical and more efficient". The Minnesota Attorney General has interpreted Minn. Stat. Ann. § 124.223 (West 1991) providing for equal transportation of both public and nonpublic students to mean that if a school district elects to transport secondary students who live between one and two miles from a district school, it must also transport nonpublic secondary students who reside the same distance from their nonpublic schools. Op. Atty. Gen., 166a-7, June 3, 1983.

²⁹⁹ 336 N.W.2d 387 (Wis. Ct. App. 1983).

³⁰⁰ Wis. Stat. Ann. § 121.54(1) (West 1991).

³⁰¹ *St. John Vianney Sch.*, 336 N.W.2d at 389.

³⁰² *Id.* at 393.

Public schools usually serve neighborhoods. Private schools may serve much larger areas, even entire municipalities. As a result, the average distance that pupils live from their public schools may be substantially less than the average distance pupils live from their private schools in the same city.³⁰³

However, the court did add one caveat that the differences in expenditures between the relative costs of busing nonpublic as opposed to public school students may "become so grossly disproportionate as to breed political divisiveness along religious lines."³⁰⁴

In *Janasiewicz v. Board of Education of the County of Kanawha*,³⁰⁵ the West Virginia Supreme Court expanded further on the distinction between public and nonpublic school children in terms of providing state-mandated transportation. In that case, parents of parochial students sought an order requiring the county board of education to provide school bus transportation for their children to and from parochial schools. State statute required that "adequate means of transportation" be provided "for all children of school age."³⁰⁶ In ruling that the county need only provide "a full monetary stipend and permission to ride school buses on regularly scheduled (public) bus routes,"³⁰⁷ the court found that there is a rational basis for distinguishing between public and parochial school children. "All children under sixteen years old are required to attend approved schools; but a parochial school student has chosen to reject a free public school education in favor of a privately paid education emphasizing religious beliefs and principles."³⁰⁸

Minnesota under its Equal Transportation Act³⁰⁹ permits public school boards to transport students to nonpublic schools in another public school district "if transportation is to schools maintaining grades or departments not maintained in the district or if attendance of such children at school can more safely, economically, or conveniently be provided for by such means." In *Eldredge v. Independent School District No. 625*,³¹⁰ the Minnesota Court of Appeals refused to require the defendant public school district to transport nonpublic school students to a nonpublic school in another district simply because the school in the other

³⁰³ *Id.* at 394.

³⁰⁴ *Jamestown*, 699 F.2d at 10.

³⁰⁵ 299 S.E.2d 34 (W. Va. 1982).

³⁰⁶ W. Va. Code § 18-5-13(6)(a) (West Supp. 1991).

³⁰⁷ *Janasiewicz*, 299 S.E.2d at 38.

³⁰⁸ *Id.*

³⁰⁹ Minn. Stat. Ann. § 123.78(1)(b) (West 1991).

³¹⁰ 422 N.W.2d 319 (Minn. Ct. App. 1988).

district had courses of study not available in the students' current non-public school. Courses of study in areas such as performing arts, visual arts, foreign languages, and laboratory science which existed in the non-public school in the other district but not in the current nonpublic school did not constitute "departments" within the meaning of the statute.

Not all states interpret their transportation statutes requiring similar treatment of public and nonpublic school children in the same manner as the courts mentioned above. In *State of Nebraska ex rel. Bouc v. School District of the City of Lincoln*,³¹¹ a state statute provided in part that a public school district which provided transportation to public school children must also furnish transportation for nonpublic school children. The state statute clearly seemed to require that the school district must provide transportation for school children residing more than 1 1/4 miles from school, but the school district had refused to transport similar non-public school children on the same route. The state supreme court held that the clear legislative intent was to provide the same benefits to all students and therefore bus service had to be provided. In *Pushay v. Walter*,³¹² a public school district ran afoul of an Ohio statute³¹³ which permitted local school to pay the cost to parents of transporting nonpublic school children rather than transport the children themselves where the district had received prior confirmation from the state department of education that such transportation would be "impractical." The Ohio Supreme Court ordered that transportation be provided nonpublic school children in this case because, in attempting to prove that the transportation was "impractical", the district had deceptively included travel item figures generated by having bus drivers drive around in empty buses, had inflated bus driver wages by twenty-five percent, and had greatly understated the number of students to be transported.

E. Transportation for Special Student Needs

1. Constitutional Concerns

The obligation of public school districts to provide transportation for students with disabilities depends largely on state and federal statutes, although occasionally constitutional issues are litigated. In *Kennedy v. Board of Education, McDowell County*,³¹⁴ the West Virginia Supreme Court found a local school board had denied two elementary age children with spinal bifida equal protection of the laws by refusing to send a bus

³¹¹ 320 N.W.2d 472 (Neb. 1982).

³¹² 481 N.E.2d 575 (Ohio 1985).

³¹³ Ohio Rev. Code Ann. 3327.01 (Page 1990).

³¹⁴ 337 S.E.2d 905 (W. Va. 1985).

driver down a private road to pick them up. Since the road was not safe for a large bus, the school district was ordered to purchase a smaller bus that could traverse the dirt road.

2. Transportation under IDEA

Most of the recent litigation in the field involves the Rehabilitation Act (section 504)³¹⁵ the Individuals with Disabilities Act (IDEA) formerly, the Education for the Handicapped Act (EHA) and Education for All Handicapped Childrens Act (EAHCA).³¹⁶ Public school districts have a duty under IDEA to provide a free appropriate education and as long as that requirement is being met at one public facility, a district has no obligation to transport a student to another public facility.³¹⁷ No reimbursement is required for transportation of a hearing impaired student to a private school where teachers were able to sign as long as the IEP in the public school the student was attending could maximize the student's potential in the "least restrictive environment" (in this case, mainstreaming).³¹⁸

As noted earlier, transportation can be a "related service" under IDEA.³¹⁹ In *Department of Education, State of Hawaii v. Katherine D.*,³²⁰ parents of a child with tracheomalacia³²¹ wanted their child educated in a regular education class in a public school, with itinerant special education speech and language services provided as well. The parents would permit their daughter to attend public school only if trained persons were available to respond to her health needs, mainly to suction excess mucus as necessary from her lungs, to administer medication before she ate lunch, and to reinsert her tracheotomy tube should it become dislodged. The state department of education recommended

³¹⁵ 20 U.S.C. § 794.

³¹⁶ 20 U.S.C. § 602. State handicapped statutes are frequently involved in litigation and tend to be very similar in language to the federal statute. See e.g., *School Dist. of Philadelphia v. Commonwealth Dep't of Educ.*, 547 A.2d 520 (Pa. Commw. Ct. 1988) ("appropriate education" under state statute required that school district provide transportation to special training class for child with progressive hearing loss.)

³¹⁷ *School Bd. of Pinellas County v. Smith*, 537 So. 2d 168 (Fla. Dist. Ct. App. 1989).

³¹⁸ *Barwacz v. Michigan Dep't of Educ.*, 681 F. Supp. 427 (W.D. Mich. 1988).

³¹⁹ See *supra*, note 275 and accompanying text. E.g., see *Aaron S. v. Westford Pub. Schs.*, 1987-88 EHLR Dec. 509:122 (school district responsible for tuition and transportation costs regarding private placement by parents without exhausting administrative review as result of inadequate IEP by public school district under EHA).

³²⁰ 531 F. Supp. 517 (D. Haw. 1982).

³²¹ This condition means that the walls of the windpipe are floppy and not rigid. The child in this case had a tracheotomy with the tracheotomy tube held in place by surgical strings. The tube enabled her to breathe and expel secretion from her lungs.

home instruction for the child since the public school did not have the continuous services of a medically trained person should an emergency situation arise.³²² That offer by the public school district was found by a hearing officer to not be "a 'free appropriate education' in the 'least restrictive environment.'"³²³ In ruling against the state department of education, the federal district court held "the DOE (department of education) must pay for a private placement when such assistance is available at no cost at a private school and Katherine D. can then avoid the confining and adverse impact of a home tutoring program."³²⁴ In addition to requiring the public school district to pay tuition to a private school, the federal court held that "Katherine D. is entitled to transportation and a school-based education with special attendants at DOE expense."³²⁵ In a similar vein, a school district can have a duty to provide, as a "related service", transportation for a handicapped child to a custodian outside the district where the child was determined to need a full-time summer school placement in order to prevent substantial regression of knowledge and skills, but the district had only provided a half-day, one month summer program without transportation and the parent needed the custodial care until she could pick up the child.³²⁶

Transportation can also be a "supportive service" under IDEA. In *Macomb County Intermediate School District v. Joshua*,³²⁷ the federal district court was directly faced with the question whether IDEA required the school district to continue providing not only transportation for a severely multiply impaired student currently enrolled in a school within the district, but also a person to assist the student should any complications arise during transportation concerning the suctioning of the

³²² This case highlights the tensions which exist between attempts to place children in the "least restrictive environment" and uncertainty by school personnel whether they can or should perform medical procedures that might be necessary to save a life. In *Katherine D.*, the administrators and three teachers in the public school to which the child had been assigned filed a grievance through their union "charging violation of their contracts of employments by being required to perform duties of a medical nature outside the scope of their contractual duty." 531 F. Supp. at 524. The United States Supreme Court has addressed this problem in part in *Irving Indep. Sch. Dist. v. Tatro*, 102 S. Ct. 3371 (1984) when the Court determined that catheterization which could be furnished by a trained lay person was a "related service" under EHA and not a "medical service."

³²³ *Katherine D.*, 531 F. Supp. at 523.

³²⁴ *Id.* at 523.

³²⁵ *Id.* The court also emphasized "that the aid *Katherine D.* needs can be and for some years has been provided by trained people; that the necessary skills can be learned at no cost in a matter of hours." This court was slightly ahead of the U.S. Supreme Court's decision in *Tatro*, *supra* note 322.

³²⁶ *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1159 (5th Cir. 1986) ("such transportation does not cease to be a related service simply because a parent requests transportation to a site a short distance beyond the district boundaries.")

³²⁷ 715 F. Supp. 824 (E.D. Mich. 1989).

student's tracheostomy tube. After analyzing several cases, including *Katherine D.* and *Tatro*, the court determined that "the transportation of the [student] to and from school represents supportive services under the [IDEA]"³²⁸ and "the medical services exclusion [in IDEA] is limited to services provided by a licensed physician."³²⁹

In *Fallon v. Scotch Plains-Fanwood Board of Education*,³³⁰ a state court addressed a different kind of handicapped child situation with implications for pupil transportation. In *Fallon* plaintiff-parents had placed their child in a private day school for neurologically impaired children because the public school district where the child had attended for 9 1/2 years had refused to change the child's classification "from 'multiply handicapped,' with her primary handicap being educable mentally retarded, to 'neurologically impaired.'"³³¹ Plaintiffs sought \$16,000 reimbursement for 2 1/2 years expenses at the private school. The issue before the court was whether the lack of responsiveness of the public school district to plaintiff's requests justified placement in the private school without the parents having exhausted their administrative remedies under IDEA.³³² Not only was the school district ordered to reimburse the parents in *Fallon* but, because the school district's refusal to reimburse was considered to be "substantially unwarranted and unreasonable", the district was ordered to pay also \$3,926 interest on the sum required to be reimbursed.

³²⁸ Macomb, 715 F. Supp. at 827.

³²⁹ *Id.* at 828.

³³⁰ 447 A.2d 607 (N.J. Super. Ct. App. Div. 1982).

³³¹ *Id.* at 608.

³³² The issue of exhaustion of remedies under EHA is very important and much litigated. Under the statutory "stay-put" rule, a child must stay in his/her current placement until the administrative review process is completed. Generally, parents of a handicapped child will not be reimbursed for expenses incurred in removing a child from a public school placement and placing the child in a private placement before the administrative review process is over. See *Newport-Mesa Unified Sch. Dist. of Orange County v. Hubert*, 183 Cal. Rptr. 334 (Ct. App. 1982) (no reimbursement for costs of child's private schooling incurred during pendency of administrative proceedings held to determine placement); *Stacy G. v. Pasadena Indep. Sch. Dist.*, 695 F.2d 949 (5th Cir. 1982) (state only obligated to maintain level of funding prior to parents' placement in private school while administrative process was underway). See also, *Board of Educ. of City of N.Y. v. Ambach*, 612 F. Supp. 230 (E.D.N.Y. 1985) (initial placement of handicapped child in private school pursuant to court order became current placement under EHA and school board responsible for tuition until review proceedings completed). *Contra* *Blomstrom v. Massachusetts Dep't of Educ.*, 550 F. Supp. 707 (D. Mass. 1982) (school committee responsible for day portion of private placement by parents because of committee's failure to design appropriate placement, but not for non-day portion of private residency expenses because the parent placement had occurred prior to exhaustion of administrative review); *Parks v. Pavlovic*, 557 F. Supp. 1280 (N.D. Ill. 1983) (parents not responsible for exhausting administrative appeal where state agency had refused to decide the parents' administrative appeal).

3. Remedies under IDEA and Section 504

Beyond the matter of reimbursement for expenses involved in private placement IDEA does not appear to offer the possibility of recovering money damages under an IDEA private suit or the possibility of using other statutes to recover damages under IDEA. As was noted earlier in *Hurry v. Jones*³³³ a federal appeals court had struck down damage awards made to parents suing under IDEA where the awards had been based on section 504 remedies. In *Smith v. Robinson*³³⁴ the United States Supreme Court settled the matter by interpreting IDEA to be a comprehensive scheme to aid the states in complying with the constitutional obligation to provide public education for the handicapped. In *Smith* the plaintiff-parents could not circumvent IDEA by seeking damages under section 1983 for equal protection violations, nor could they enlarge the IDEA remedies by seeking damage recovery under section 504 of the Rehabilitation Act.³³⁵ While reimbursement of expenses is clearly permitted now under IDEA,³³⁶ reimbursement does not seem to extend to compensatory education where a handicapped child has been denied an appropriate educational program.³³⁷ Formerly, successful plaintiffs had been prevented from recovering attorney fees in IDEA cases under civil rights statutes, even if the claim was designated as a due process claim.³³⁸ However, the IDEA was amended in 1986 to permit recovery of attorney fees.³³⁹

As suggested in *Smith*, damages and attorney fees are recoverable in section 504 actions.³⁴⁰

4. Private School Placement for the Handicapped

Transportation expenses pertaining to placement of handicapped in private schools has been a special area of litigation under IDEA. A decision by a parent to place his child in a private school may find that certain transportation expenses are not reimbursable. In *Bales v. Clarke*,³⁴¹ parents placed their handicapped child in a private out-of-state

³³³ *Supra* notes 267-279 and accompanying text.

³³⁴ 468 U.S. 992 (1984).

³³⁵ See also, *Sanders v. Marquette Pub. Schs.*, 561 F. Supp. 1361 (W.D. Mich. 1983) (money damages not recoverable in private suit under EHA even if education officials acted in bad faith).

³³⁶ *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359 (1985).

³³⁷ See *Alexopoulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551 (9th Cir. 1987).

³³⁸ *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986).

³³⁹ 20 U.S.C. § 1415 (e)(4)(B).

³⁴⁰ See *Rothseild v. Grottenthaler*, 716 F. Supp. 796 (S.D.N.Y. 1989) (section 504 does not prohibit section 1983 action based on handicap discrimination).

³⁴¹ 523 F. Supp. 1366 (E.D. Va. 1981).

school for handicapped children because the public school district had allegedly failed under both the state and federal statutes to provide a "free and appropriate education."³⁴² In denying the parents' request for reimbursement for transportation expenses to visit their child, the court observed that "neither the Virginia statute, the Virginia regulations, nor the federal act provide funding expenses for parents' transportation."³⁴³ Likewise, parents have no legal right to transportation for their child to a nonpublic school where no relationship exists between the child's need for transportation and the child's impairment. In *McNair v. Oak Hills Local School District*,³⁴⁴ the federal appeals court determined that a student, who did not meet the time-traveled requirement to qualify under state statute³⁴⁵ for free bus transportation to her nonpublic school, could not invoke the IDEA where her impairment (deafness) had no relationship to her need for transportation. Similarly, parents could not recover the full cost of transporting their orthopedically handicapped child to a private school where the child was not receiving any special education at the private school.³⁴⁶

5. Transportation of Mentally Gifted

A topic that appears to attract little legal attention is the obligation for school districts to provide transportation under state statutes that require special programs for "mentally gifted" students. In *Woodland Hills School District v. Commonwealth Department of Education*,³⁴⁷ state statute basically defined the "mentally gifted" as those with an IQ over 130 who needed special services or activities not ordinarily provided in the regular program.³⁴⁸ The programs were open to both public and nonpublic students and, in developing its program, defendant district had designed a half-day weekly program in one of its elementary schools to and from which nonpublic students were transported. However, the district changed its gifted program to provide gifted instruction in each elementary school and used itinerant teachers, and in the process eliminated transportation for nonpublic students. Nonpublic school parents successfully sued the district alleging their children were being denied

³⁴² 204 U.S.C. § 1412(a); Va. Code § 22.1-214(A) (Supp. 1991).

³⁴³ *Bales*, 523 F. Supp. at 1370.

³⁴⁴ 872 F.2d 153 (6th Cir. 1989).

³⁴⁵ *McNair*, 872 F.2d at 154-55. To qualify for free bus transportation the student had to live more than 2 miles from the nonpublic school, but the direct driving distance could not exceed 30 minutes. In this case, the student lived more than 2 miles from school but the driving time was 34 minutes.

³⁴⁶ *A.A. v. Cooperman*, 526 A.2d 1103 (N.J. Super. Ct. App. Div. 1987).

³⁴⁷ 516 A.2d 875 (Pa. Commw. Ct. 1986).

³⁴⁸ Pa. Stat. Ann. § 34.11(v) (Purdon Supp. 1991).

their rights to special education under the state statute. In upholding the parents' claim the court ordered the school district to provide either mid-day transportation or board and lodging to nonpublic students in the gifted program.

F. Transportation for Purposes of Desegregation

1. Rationale for Mandatory Busing

The use of mandatory busing to achieve racial integration has had a turbulent judicial history. As one federal judge observed, "The question of mandatory busing is perhaps the single most divisive issue in any school desegregation plan.... Few ideas are more calculated to lead to public resistance of a plan than the thought of small children being forced to travel great distances away from their homes."³⁴⁹

Ironically, the perceived drastic measure of mandatory busing to eliminate segregation has frequently been only a necessary response to local pressure on school boards to resist integration of school attendance zones. Some of the school board actions in avoiding or forestalling school integration as they implicate transportation have been moving white student population areas into school attendance zones that had greater predominance of white students,³⁵⁰ permitting white students to pay tuition and transfer to predominantly white public schools,³⁵¹ and closing of schools in predominantly black areas.³⁵²

2. *De jure* Segregation

In evaluating desegregation plans courts have had to consider a wide range of factors: the unitary or non-unitary status of the school district; the distance and length of time of bus travel; the age of the students involved; and, the presence or absence of other segregation patterns in the community. A judicial determination that a school district has engaged in *de jure* segregation, primarily by means of gerrymandering school attendance zones, so as to establish and preserve segregated schools has resulted in drastic judicial mandatory busing orders. In *Hoots*

³⁴⁹ *Hoots v. Commonwealth of Pa.*, 539 F. Supp. 335, 344 (W.D. Pa. 1982).

³⁵⁰ *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1233-34 (2d Cir. 1987).

³⁵¹ *Berry v. Sch. Dist. of City of Benton Harbor*, 564 F. Supp. 617, 621 (W.D. Mich. 1983).

³⁵² *Hoots*, 539 F. Supp. at 341. ("The wishes of the parents in the predominantly white neighborhood [to not want their children to attend a school in a predominantly black area with the possibility of those parents taking their children out of the public schools] is not a valid consideration in the adoption of a desegregation plan. The closing of formerly black schools for racial reasons is a prohibited form of discrimination.")

v. Commonwealth of Pennsylvania,³⁵³ five school districts in Pittsburgh, four overwhelmingly white and one overwhelmingly black, were ordered to be consolidated into one desegregated district. The court rejected a proposed district busing proposal that would have only bused black students to predominantly white schools because "the alienation which results when groups of children are continually split apart and shuttled between schools with differing student bodies will fall primarily on black students, while white students continue their education as a cohesive group."³⁵⁴

The experience in *Hoots* illustrates the confluence of three policy concerns: eliminating the vestiges of official or *de jure* segregation; providing desegregated educational services; and minimizing inconvenience to the clientele being served, namely the students. In *Hoots*, development of a clustering plan involving "linking contiguous elementary schools together to form a compact attendance zone" broke up the segregated attendance areas, provided for integrated schools, and resulted in one-way travel time of 20 minutes or less.³⁵⁵ In school attendance zones where mandatory busing time could be minimized and where, as in *Hoots*, white students had already been accustomed to being bused to predominantly white schools the idea of student transportation was neither excessive nor impractical. In a slightly different approach to busing assignments, a federal appeals court in *United States v. Lawrence County School District*,³⁵⁶ has indicated that a school board actually needed to gerrymander the bus routes where, despite seventeen years under court-ordered desegregation, 2/3 of buses were still 75% of one race and 1/3 of buses were 100% of one race.

3. Changing Demographics

Changing demographics, however, may compel courts to evaluate desegregation plans in light of the above three policy concerns with different results. In *United States v. Board of Education of the City of Chicago*,³⁵⁷ a school board plan to desegregate Chicago's largely black and hispanic public schools was upheld as constitutional even though

³⁵³ For a history of this protracted litigation, see 672 F.2d 1107, 1109-10 (3d Cir. 1982). Over a span of eleven years between 1972 and 1983, *Hoots* had an incredible fourteen reported cases, referred to as *Hoots* I through XIV. For a list of the citations, see *Hoots* XIV, 703 F.2d 723 (3d Cir. 1983) n. 1.

³⁵⁴ *Hoots*, 539 F. Supp. at 340.

³⁵⁵ *Id.* at 345, 346.

³⁵⁶ 799 F.2d 1031 (5th Cir. 1986).

³⁵⁷ 554 F. Supp. 912 (N.D. Ill. 1982).

mandatory busing was not included as part of the plan. With the student demographics having changed dramatically over the period of thirteen years and the percentage of white students having declined from 34 to 16 percent,³⁵⁸ the federal district court made two perceptive observations: "the inclusion of mandatory busing in a plan has importance to minority parents as evidence the plan is really committed to equal and non-segregated education for their children;"³⁵⁹ and "it would be ironic to require token transfers of white students to predominantly-black or all-black schools to serve that purpose, when the use of tokenism in other contexts is properly offensive to every minority group."³⁶⁰ While the two observations may appear facially to be contradictory, the court noted that experiences with mandatory busing in comparable cities like Los Angeles, Boston, and Detroit demonstrated that 40-45% of white students reassigned by transportation to minority schools could be expected to be lost to nonpublic or suburban schools, thus making desegregation even more improbable.³⁶¹ The court attempted to bridge the gap between the constitutional proscription of segregated education and the practical realities of population demographics:

Court involvement in school desegregation cases derives from the Equal Protection Clause. One obvious facet of equal protection of the laws is the extent to which a desegregation plan, required to address the right to equality of education, may itself impose disproportionate burdens on the already disadvantaged students participating in the plan.... Once within the range of constitutionally permissible desegregation plans, however, the Board [of Education is] free to choose one calculated to minimize parent resistance and thereby serve its larger goal.³⁶²

4. Unitary Status

Where a public school district has been determined to be unitary, i.e., no longer engaged in *de jure* segregation, courts tend to minimize the role of busing in the arsenal of desegregation remedies. In *Ross v. Houston Independent School District*,³⁶³ the racial composition within

³⁵⁸ Black students had increased from 54.8% to 60.7% and hispanics from 9.7% to 20.4%. *City of Chicago*, 554 F. Supp. at 916.

³⁵⁹ *Id.* at 925.

³⁶⁰ *Id.* at 925-26.

³⁶¹ *Id.* at 925.

³⁶² *Id.* at 922, 925.

³⁶³ 699 F.2d 218 (5th Cir. 1983).

the city of Houston had changed substantially from 1970 when the first desegregation plan had been entered into.³⁶⁴ The city school district over a period of ten years had developed desegregation plans using pairing, busing and magnet schools.³⁶⁵ In 1980, the federal government sought to include 22 neighboring districts in a massive multi-districting plan. The federal district court denied the government's position and determined that "the district has eliminated the vestiges of de jure segregation in the composition of the student body of individual schools even though many schools are identifiably one-race."³⁶⁶ In addition, the district court noted the past inadequacies of busing as a desegregation tool and decided that "there are not enough white students left in the district to effect greater integration of student bodies without untoward costs on the students themselves."³⁶⁷ Where a school district has removed the vestiges of *de jure* segregation, the federal appeals court agreed with the district court's rejection of government demands for cross-district busing.³⁶⁸

The type of analysis used in *Ross* regarding desegregation and demographics has been evidenced in more recent decisions. In *Tasby v. Wright*,³⁶⁹ a federal district court has upheld the establishment of four neighborhood remedial educational centers and the end of mandatory busing in the Dallas Independent School District. In 1976 the federal court had approved a desegregation plan that had bused grades 4-6 minority students from West Dallas to North Dallas, but in the succeeding nine years the white student population in Dallas had declined 44% and the average minority population throughout the district had risen to 78.2%.³⁷⁰ In ending the use of mandatory busing the court noted both the reality of demographics and the qualitative educational changes the district was proposing in the new centers.

In the court's opinion it is pointless to bus minority students from the minority neighborhoods of West Dallas to attend predominantly minority schools in North Dallas; such transportation does not serve a desegrega-

³⁶⁴ *Id.* at 220. In 1970 the student population was 53.1% white, 33.5% black, and 13.4% hispanic. By 1978-79 the percentages were 30.8% white, 45% black, and 24.2% hispanic. By 1985-86 the enrollment was projected to be 20% white, 38% black, and 42% hispanic.

³⁶⁵ *Id.* at 224.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 226. The appeals court noted that "even if some method were devised to spread white students equally among all schools in the system, 74% of the students in each school would be black and hispanic."

³⁶⁸ The district court had originally defined racial imbalance as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment...of no school will exceed fifty percent of the student body." 473 F. Supp. 996, 1006 (W.D. Wash. 1979).

³⁶⁹ 630 F. Supp. 597 (N.D. Tex. 1986).

³⁷⁰ *Id.* at 603.

tive purpose....The court finds that the small class sizes, the emphasis on skilled teachers and specially trained administrators, and the longer school day, together with the other benefits detailed in the West Dallas Plan, are more likely to benefit desegregation than the present busing to North Dallas 4-6 Centers.³⁷¹

Similarly, in *Flax v. Potts*,³⁷² a federal court of appeals has upheld a federal district court order that busing for desegregative purposes be discontinued in the Fort Worth Independent School District. The court reasoned that continued busing would have the effects of transporting black students from relatively integrated schools to predominantly black ones and white students from predominantly black schools to predominantly white ones, of displacing time from student involvement in extra-curricular activities and parent involvement in schools, and expending money on busing that better could be used in the primarily minority schools.³⁷³

Establishment of a voluntary reassignment plan in the Austin Independent School District has been upheld for elementary age students with students attending Priority Schools in close proximity to their homes.³⁷⁴ In light of an earlier determination that the school district was a unitary district, the court was able to consider the district's plan independently of past discrimination practices with the burden of proving discriminatory intent consequently resting with the plaintiffs, and then to reach the conclusion that "[i]t is proper for a school district to consider the age of students in evaluating the extent to which they should be subjected to involuntary transportation."³⁷⁵

5. Neighborhood Housing Discrimination and Busing

The elimination of mandatory busing in favor of neighborhood schools, especially where the busing would be from one minority area to another, depends on whether other factors may have contributed to the minority character of a neighborhood. In *United States v. Yonkers Board of Education*,³⁷⁶ federal courts found that both the City of Yonkers and the school board were responsible for the segregation of blacks and

³⁷¹ *Id.* at 603, 607.

³⁷² 864 F.2d 1157 (5th Cir. 1989).

³⁷³ *Id.* at 1161. The net savings to the school district was estimated to be \$175,000.

³⁷⁴ *Price v. Austin Indep. Sch. Dist.*, 729 F. Supp. 533 (W.D. Tex. 1990).

³⁷⁵ *Id.* at 550. The neighborhood schools allowed the district to meet one of its goals of reducing the length of bus rides for most elementary age students to less than 45 minutes. *Id.* at 537, 538.

³⁷⁶ 837 F.2d 1181 (2d Cir. 1987).

hispanics in the city's schools. While the city was responsible for construction of virtually all minority housing in only one section of the city, the school board had contributed to the segregative pattern by means of school zone assignments, staff assignments, placement of minorities in special education classes, selection of schools to open or close, and systematic exclusion of minorities from vocational programs.³⁷⁷ The comprehensive transportation plan ordered by the federal courts, including free busing for all students throughout the district to new magnet schools, for students participating in the voluntary transfer program, for students more than 1 1/2 miles from their neighborhood schools, and for adults enrolled in adult programs,³⁷⁸ was more expensive than a simple mandatory busing plan would have been,³⁷⁹ but the courts demonstrated no sympathy for either the school district's determination of segregative intent or the city's responsibility for having to fund the more expensive transportation scheme.

It was not the Board's failure to adopt busing that violated the minority students' rights; rather the evil lay in the combination of the Board's promotion and enhancement, through deliberately discriminatory acts and practices, of a segregated school system and its purposely discriminatory refusal to take any significant desegregative action whatever.³⁸⁰

The sequel to cases such as *Yonkers* has been the active involvement of school boards in other school districts to draft agreements with municipalities and developers concerning the rental and sale of housing units to achieve racial integration. The impetus for such efforts have been school board policies, prompted in significant part by the threat of loss of federal funds by the U.S. Department of Education's Office of Civil Rights, which granted reprieves for school children from being bused for racial balance if the neighborhoods are racially balanced. Most of the agreements follow the same basic formula:

The school board agrees to waive a given area from compliance with forced-busing as long as, by a set deadline, the student population sent by that area to local

³⁷⁷ *Id.* at 1227-1232. A comprehensive discussion of the discrimination in both housing and schools can be found in *United States v. Yonkers Bd of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).

³⁷⁸ See *Yonkers*, 635 F. Supp. 1538, 1550 (S.D.N.Y. 1986).

³⁷⁹ *Yonkers*, 837 F.2d at 1237-39.

³⁸⁰ *Id.* at 1232-33.

schools is racially balanced, or 10 percent to 40 percent black. The agreements generally contain a strategy for promoting housing integration that may include building dwellings of varying sizes, lowering rents, and targeting marketing campaigns at blacks. Whites in search of a home, meanwhile, hear the pitch that a given neighborhood is free of busing.³⁸¹

Courts have discretion in determining how transportation expenses to achieve desegregation are to be allocated. In *Yonkers*, the City of Yonkers was ordered to fund the court-ordered remedy, while the school board was responsible to submit itemized expenses to verify that the increased funds for the schools were indeed being spent on the schools.³⁸² In *Berry v. School District of City of Benton Harbor*,³⁸³ a federal district court judge approved a voluntary transfer plan between a predominantly black city district and two largely white adjacent rural districts. In addition to ordering the three districts to design an interdistrict transportation plan, the state was ordered to pay two-thirds of the districts' desegregation transportation costs.

IV. CONCLUSION

Transportation problems in education present a complex collage of interacting issues. Governance concerns regarding the operation and funding of school transportation can be a sensitive state political issue. Sorting out the constitutional and statutory responsibilities among the legislature, the state department of education, and the local school district has not always been easy, but the task must be done if unnecessary duplication of work and contradictory directives are to be avoided. Even if administrative responsibilities are clearly determined, legislative or administrative statutes or regulations face judicial scrutiny under federal and state constitutional standards, as well as consistency within the total state legislative scheme. At the day-to-day operational level school boards and district administrators are responsible for assuring safety in transporting students according to established guidelines.

³⁸¹ Education Week, Feb. 26, 1992 at 9, col. 3-4.

³⁸² *Yonkers*, 837 F.2d at 1239.

³⁸³ 554 F. Supp. 912 (N.D. Ill. 1983).

Recommendations for school transportation are not easy to make where transporting students is almost solely a state responsibility. Yet, a number of generic suggestions can be proposed:

1. Student transportation is an extremely expensive matter and state reimbursement aid is critical if school districts are to provide services as mandated by state or federal law. The important condition precedent to reception of state reimbursement is compliance with state and/or federal requirements pertaining to deliverance of transportation services. In an increasingly regulated society where public schools have become the laboratories to effect social change, knowledge of yet one more regulated area, in this case student transportation, is important if the schools are to be able to afford the cost of achieving their legislatively designed purposes.

2. Schools and school districts must have coherent policies consistently enforced pertaining to the types of vehicles to be used on school activities. Where school administrators do not want to use school-owned buses for school-related or school-sponsored activities, they need to consider that decision carefully in light of any legal problems concerning alternate forms of transportation. The use of private student or faculty cars has always been a concern for administrators and the car owners alike. At the very least administrators should advise a person using his/her private vehicle to transport students to carry adequate liability insurance. Similarly, renters of leased vehicles need to be advised that the rental company's liability will generally be limited to that of the renter's own vehicle insurance. To reduce the possibility of separate exposure of individual faculty member liability, schools may want to consider leases or rentals directly in the name of the school or school district. Where faculty engage in collective bargaining, the union may wish to consider the purchase of adequate liability insurance for faculty in the course of their employment as a subject to be included in the collective bargaining agreement.

3. The care which parents/guardians expect schools to extend to students will often result in litigation where injury appears to have occurred because the level of care expected was not achieved. Although not all problems can be prevented, certain kinds of preventive measures are clearly within the control of schools and school districts. Regular maintenance of school-owned buses is certainly a responsibility schools will be expected to meet and use of buses that are defective and do not satisfy appropriate state safety standards will not be readily defensible. Even where school bus service is contracted with private bus companies, schools and school districts have a responsibility to report defects and to demand that repairs be made. Failure to make repairs could result in contract rescission. Where school bus drivers are employees of the school or school district, the school or school district will be expected to monitor compliance with state standards and to take appropriate action if a driver-employee is in violation of a standard. If the driver in violation of a state standard is an employee of a private contractor, the school or school district responsibility may include not only reporting the offending driver to the appropriate officials, but also possible rescission of the bus contract. Bus drivers are employees of the school or school district, the school or school district will be expected to monitor compliance with state standards and to take appropriate action if a driver-employee is in violation of a standard. If the driver in violation of a state standard is an employee of a private contractor, the school or school district responsibility may include not only reporting the offending driver to the appropriate officials, but also possible rescission of the bus contract.

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